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REPORTS

OF

615

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING

JANUARY TERM, 1855.

BY J. W. SHEPHERD,

STATE REPORTER.

40586

VOL. XXVI.

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OFFICERS OF THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

Hon. WM. P. CHILTON, Chief Justice.
Hon. GEORGE GOLDTHWAITE, } Associate Justices.
Hon. SAMUEL F. RICE,* }

M. A. BALDWIN, Attorney General.
JOHN D. PHELAN, Clerk.

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* Elected by the Legislature to fill the vacancy caused by the resignation of the Hon. David G. Ligon, which took effect on the 1st January, 1855.

TABLE OF CASES.

Adams and Wife v. Adams, 272
Allen v. Harper, 686
Anders, guardian, &c., ats. Kirby's Adm'r, 466
Anderson ats. Couch, 676
Antonez v. The State, 81
Appleton ats. Moore, 633
Barnes ats. Mobley, 718
Bates ats. Eckles & Brown, 655
Bennett v. Fail & Patterson, 605
Blevins v. Buck, 292
Bondurant ats. Nelson, 341
Boyles ats. Johnson, 576
Bradford ats. Lundie, 512
Bradford ats. McLaren, Ragan & Co., 616
Bradford ats. Stewart, 410
Brister et al. (slaves) v. The State, 107
Brock v. The State, 104
Brown & Eckles v. Bates, 655
Brown & Eckles v. Carter, 563
Bryan v. The State, 65
Buck ats. Blevins, 292
Byrd v. McDaniel, 582
Carriere v. Ticknor, 571
Carter ats. Eckles & Brown, 563
Carver v. Hallett, executor, &c., 722
Case v. The State, 17
Chamberlain v. Gaillard, 504
Chamberlain & Co. v. Masterson, 371
Chambers v. The State, 59
City Council of Montgomery ats. Gilmer & Taylor, 665
Clark ats. Haley, 439
Cockrell and Wife v. Gurley, 405
Commissioners' Court of Dallas Co. ats. Keenan, 568
Cotton ats. Dawson, 591
Couch v. Anderson, 676
Covey ats. Jones, 464
Cowles ats. Jones, 612
Crow ats. Hudson, 515
Crow ats. Patton, 426
Darrington & Savage v. Walshe & Emanuel, 619
Dawson v. Cotton, 591
Dearing v. Moore, 586
De Jarnette ats. Tyus, 280
Denson v. Mitchell and Wife, 360
Doe *ex dem.* Rochon's Heirs ats. Kennedy's Executor, 384
Downs ats. Gill, 670
Duke's Adm'r v. Duke's Distrib's, 673
Duramus v. Harrison & Whitman, 326
Eastman v. Hobbs, 741
Eckles & Brown v. Bates, 655
Eckles & Brown v. Carter, 563
Elam v. The State, 48
Elliott v. The State, 78
Elliott & Stanley v. The State, 26
Ellsworth v. Tartt, 733
Emanuel & Walshe ats. Savage & Darrington, 619
Ewing v. Peck, 413
Ex parte Garlington, 170
Ex parte Gist, 156
Ex parte Rowland, 133
Ex parte Vincent, 145
Fail & Patterson ats. Bennett, 605
Farmer's Distributees v. Farmer's Adm'r, 671
Farmer (Owners of Steamboat) v. McCraw, 189
Fenner v. Kirkman, 650
Flournoy's Heirs ats. Miller and Wife, 724
Floyd v. Morrow, 353

Gaillard ats. Chamberlain, 504
Garlington, *Ex parte*, 170
Gill v. Downs., 670
Gilmer & Taylor v. City Council of Montgomery, 665
Gist. *Ex parte*, 156
Gurley ats. Cockrell and Wife. 405
Haley v. Clark. 439
Hall v. Holcombe. 720
Hallett, executor, &c , ats. Carver, 722
Hamilton v. Williams, 527
Hamlet v. Johnson, 557
Hardy v. Hardy's Heirs, 524
Harkness v. Sears & Walker. 493
Harper ats. Allen, 686
Harrall v. The State. 52
Harris v. Hillman, 380
Harrison & Whitman ats. Duramus, 326
Hillman ats. Harris, 380
Hobbs ats. Eastman, 741
Hoffman v. Hoffman, 535
Holcombe ats. Hall, 720
Howard's Distributees v. Howard's Adm'r, 682
Hubbard and Wife ats. Jordan's Adm'r, 433
Hudson v. Crow, 515
Huguenin ats. Letondal. 552
Ikelheimer ats. Ozley, 332
Jenkins v. McConico, 213
Johnson ats. Hamlet, 557
Johnson ats. Manning. 446
Johnson v. Boyles, 576
Jolley v. Walker's Adm'rs. 690
Jones v. Covey, 464
Jones v. Cowles, 612
Jones v. The State, 155
Jones' Adm'r ats. Miller, 247
Jordan's Adm'r v. Hubbard & Wife, 433
Keenan v. Commissioners' Court of Dallas Co., 568
Kennedy's Ex'r v. Rochon's Heirs, 384
Kirby's Adm'r v. Anders, guardian, &c., 466
Kirkman ats. Fenner, 650
Kirksey ats. Montgomery's Ex'rs, 172
Landman v. Snodgrass, 593
Langdon ats. Rolston, 660
Letondal v. Huguenin, 552
Lightfoot ats. Stiles & Co., 443
Locke's Executor v. Palmer, 312
Loftin ats. Shearer, 703
Lundie v. Bradford, 512
Manning v. Johnson, 446
Martha (a slave) v. The State, 72
Martin's Heirs v. Tenison, 738
Masterson v. Chamberlain & Co., 371
Mayor, &c., of Mobile v. Rowland & Co., 498
McAllister v. McDow, 453
McCauley v. The State, 135
McConico ats. Jenkins. 213
McCraw ats. Owners of Steamboat Farmer, 189
McDaniel ats. Byrd, 582
McDow ats. McAllister, 453
McGar v. Williams, 469
McGehee ats. Nesbitt. 748
McGehee v. The State, 154
McGuire ats. Moore, 461
McLaren, Ragan & Co. v. Bradford, 616
McTyer v. Steele. 487
Miller v. Jones' Adm'r, 247
Miller and Wife v. Flournoy's Heirs, 724
Minell & Co. v. Reed, 730
Mitchell and Wife ats. Denson, 360
Mobley v. Barnes, 718
Montgomery's Ex'rs v. Kirksey, 172
Moore ats. Dearing, 586
Moore v. Appleton, 633
Moore v. McGuire, 461
Moore v. The State, 88
Morrison ats Taylor, 728
Morrow ats. Floyd. 353
Morrow ats. Turney's Adm'r. 339
Nelson v. Bondurant, 341
Nesbitt v. McGehee, 748
Newman ats. Stallings, 300
Noles v. The State, 31
Owen v. Slatter, 547
Owners of Steamboat Farmer v. McCraw, 189
Ozley v. Ikelheimer, 332
Palmer ats. Locke's Executor. 312
Patterson & Fail ats. Bennett, 605
Patton v. Crow, 426
Paulling v. Watson, 205
Pearson ats. Smith, 603
Peck ats. Ewing, 413
Pickens v. Yarborough's Adm'r, 417
Prater v. Stinson and Wife, 456
Reed ats. Minell & Co., 730

Rochon's Heirs ats. Kennedy's Ex'r, 384
Rodgers v. The State, 76
Rolston v. Langdon, 660
Rowland, *Ex parte*, 133
Rowland & Co. ats. Mayor, &c., of Mobile, 498
Savage & Darrington v. Walshe & Emanuel, 619
Sears & Walker ats. Harkness, 493
Shearer v. Loftin, 703
Slatter ats. Owen, 547
Smith v. Pearson, 603
Snodgrass ats. Landman, 593
Spivey v. The State, 90
Stallings v. Newman, 300
Stanley & Elliott v. The State, 26
State ats. Antonez, 81
State ats. Brister et al. (slaves), 107
State ats. Brock, 104
State ats. Bryan, 65
State ats. Case, 17
State ats. Chambers, 59
State ats. Elam, 48
State ats. Elliott, 78
State ats. Harrall, 52
State ats. Jones, 155
State ats. Martha, 72
State ats. McCauley, 135
State ats. McGehee, 154
State ats. Moore, 88
State ats. Noles, 31
State ats. Rodgers, 76
State ats. Spivey, 90
State ats. Stanley & Elliott, 26
State ats. Stewart, 44
State ats. Tims, 165
State ats. Williams, 85
State ats. Windham, 69
Steamboat Farmer v. McCraw, 189
Steele ats. McTyer, 487
Steele ats. Wyatt's Adm'r, 639
Stewart v. Bradford, 410
Stewart v. The State, 44
Stiles & Co. v. Lightfoot, 443
Stinson and Wife ats. Prater, 456
Tartt ats. Ellsworth, 733
Taylor v. Morrison, 728
Taylor & Gilmer v. City Council of Montgomery, 665
Tenison ats. Martin's Heirs, 738
Ticknor ats. Carriere, 571
Tims v. The State, 165
Turney's Adm'r v. Morrow, 339
Tyus v. De Jarnette, 280
Vincent, *Ex parte*, 145
Walker v. Walker's Distributees, 262
Walker's Adm'rs ats. Jolley, 690
Walker & Sears ats. Harkness, 493
Walshe & Emanuel ats. Savage & Darrington, 619
Watson ats. Paulling, 205
Whitman & Harrison ats. Duramus, 326
Williams ats. Hamilton, 527
Williams ats. McGar, 469
Williams v. The State, 85
Windham v. The State, 69
Wyatt's Adm'r v. Steele, 639
Yarborough's Adm'r ats. Pickens, 417

ERRATA.

In Stewart v. Bradford, p. 412, second line, for "*same* proof" read "*some* proof"; and in the sixth line on the same page, for "*from*" read "*form.*"

In McTyer v. Steele, p. 487, last line of the first head-note, after "*own*" insert "*name.*"

There are, doubtless, several other typographical errors, which the reader can readily correct, as they do not, so far as noticed, change one word into another.

Note, also, that in the cases of Denson v. Mitchell and Wife, p. 360, and McLaren, Ragan & Co. v. Bradford, p. 616, Mr. Justice RICE did not sit, having been of counsel for the appellants, in each case, before his election to the bench.

TRIBUTE OF RESPECT TO THE MEMORY OF HON. DAVID G. LIGON, DECEASED.

At a meeting of the Members of the Bar of the Supreme Court, held at the capitol on Friday, the 16th February, 1855, James E. Belser, Esq., was called to the chair, and John D. Phelan, Esq., appointed secretary; and on motion of Wm. M. Murphy, Esq., the chairman was requested to prepare, and report to an adjourned meeting, Resolutions expressive of the sentiments of the Bar in reference to the death of the Honorable David G. Ligon, late one of the Associate Justices of the Supreme Court, deceased.

At an adjourned meeting, held on the next day, the subjoined Resolutions were reported, and unanimously adopted; and Mr. Belser was instructed to present them to the Court, and to request that they be entered on its minutes.

In presenting the Resolutions to the Court, on Monday morning, 19th February, Mr. Belser said:

"*May it please the Court*—In the observance of a time-honored custom, I have been deputed by my brethren of the Bar to present this, the last token of respect, which they, as a body, can render to the memory of the Hon. David G. Ligon, deceased.

"While performing the melancholy service assigned me, it is not my purpose to pronounce a studied eulogium on the life and character of the deceased. Indiscriminate panegyric is no honor to the dead, and no benefit to the living; but to listen to the solemn admonition of our transitory existence, is useful and commendable, and may instruct us in the value of life—its purposes, its duties, and its destination.

"A short time ago, Judge Ligon was with us, in all the vigor of health, actively engaged in closing his judicial business, and in making preparations to return to the pursuits of

the law. Vain calculation! That intention was doomed to disappointment, and those who esteemed and loved him will see him no more. My information is, that he died in Moulton, Lawrence county, where he resided, shortly after one of his pulpit ministrations—at his post, as a Christian minister, proclaiming to his fellow-men the Scriptures of Truth, and honoring the pure morality they teach.

"I respectfully move the Court, that these Resolutions may be entered on its minutes:

"1. *Resolved*, That the members of this Bar, and the officers of this Court, deeply regret the sudden death of the Honorable DAVID G. LIGON.

"2. *Resolved*, That we cherish, with a warm and just remembrance, the purity of his professional life, and those amiable social qualities which so well adorned his personal character.

"3. *Resolved*, That, to testify these sentiments, we will wear the usual badge of mourning.

"4. *Resolved*, That the chairman communicate these proceedings to the Supreme Court.

"5. *Resolved*, That the secretary make them known to the family of the deceased."

To which the Chief-Justice responded as follows:

"*Gentlemen of the Bar*—The members of this Court unite with you in the tribute of respect and regard which you have been pleased to pay to the memory of our late worthy associate, the Honorable DAVID G. LIGON, and we fully concur with you in the estimate you place upon his many virtues.

"We have known him long and intimately, and for the last three years he has labored by our side as a member of this Court. His varied attainments, quick perception, and love of justice, united with his excellent social qualities, and extended benevolence, made him a valued Judge, and a highly useful and honored member of the community.

"Little did we suppose, when he took his leave of us at the commencement of the present session, that he was bidding us a final adieu, and that we should be called thus early to mourn his loss. Buoyant with hope, and apparently in good health, he left us for his loved "mountain home," with the confident expectation, as he assured us, of often revisiting this scene of his labors, and engaging in the discharge of professional duty. But Death has suddenly put an end to his earthly hopes, and

they now lie buried with him in the grave. Let this visitation teach us, that here we have no permanent abiding place; that, ere long, each one of us, in his turn, must yield obedience to the solemn mandate, 'Dust thou art, and unto dust shalt thou return.' Thus admonished, does it not behoove us to be also ready?

"As a memorial of our common grief, we order the Resolutions which you have presented to be entered on the record of this Court."

ADDENDA

TO THE CASE OF CHAMBERLAIN *vs.* GAILLARD, p. 504.

NOTE BY REPORTER.—Mr. Manning, who was of counsel for the appellee in the case of Chamberlain v. Gaillard, has recently furnished a brief of his argument, which is here inserted at his request.

A. R. MANNING, for the appellee:

1. The first special plea was no answer to the action, and the demurrer to it was, therefore, properly sustained.

2. The plea on which the trial was had (itself bad, though the demurrer to it was overruled) was not sustained by the evidence. One of its averments is, that the title to the slave Adam was a material question in the action of assumpsit by the appellant against Gaillard. This was not proved by the witness McKinstry, if it were proper to have proved it by him; nor was it proved by the record of that suit. That action was against Gaillard, as bailee of Chamberlain, for the use and hire of the slave a long time previous; in which action title is not inquired into, and accordingly is not alleged in the precedents.—2 Chitty's Pl. 61; 2 Saunders on Pleading and Evidence, p. 566; Lewis v. Willis, 1 Wils. 314; Richard v. Holditch, *ib.* The averment of Chamberlain's ownership of the slave, in that action, was therefore immaterial, and not being descriptive, it was not necessary to prove it—it was mere surplusage.—Gould's Pl. (3d ed.) 164; United States v. Burnham, 1 Mason's R. 57; 31 Maine R. 184; Winn v. White, 2 W. Bla. 840. Indeed, the adversary claims of Chamberlain and Gaillard to the slave are not only not proved to have been decided in that action, but they could not have been decided under the declaration.—Crow v. Boyd's Adm'r, 17 Ala. 51; Jones v. Hoar, 5 Pick. 285.

3. On the admissibility of parol evidence to sustain a plea of former recovery, there are some loose decisions, and more loose dicta. Who were the persons that, under certain names, have been parties to a suit, and what was the property, or other subject-matter about which the suit was brought, may be proved by other evidence than that of the record; for they cannot be filed away, with the papers of the cause, in the office of the clerk, to be afterwards inspected; and, besides, the mere identity of these, in general, can be easily established. But for a court to inquire or be informed what questions in respect to that subject-matter it or another court decided, not by the record of the proceedings and the nature of the action, but by the testimony of persons of different degrees of intelligence, integrity and memory, who might have been present when the cause was decided, and to call things thus proved (and so dependent on the lives and memory of witnesses) *res judicatæ*, would hardly satisfy the ideas which those words suggest even to common understandings. In the case of Davidson v. Shipman, 6 Ala. 27, (as this court admitted,) it was abundantly proved by the presiding judge, and others who were present at the trial of another suit between the same parties, that the validity of a certain mortgage under consideration had been hotly contested between them, charged on by the court, and referred to the jury as the main question for their determination; "still," said this court, after looking into the record of that suit, "it was not necessary to decide it, and therefore *non constat* that they (the jury) did decide it."

REPORTS

OF

CASES ARGUED AND DETERMINED

AT JANUARY TERM, 1855.

CASE *vs.* THE STATE.

1. Under an indictment for larceny from a store-house, (Code, §§ 3170, 3175,) if the jury assess the aggregate (instead of the separate) value of the stolen articles, the irregularity is not available to the defendant, either on motion in arrest of judgment, or on error.
2. If the defendant was a mere servant of his employer, having charge of the store-house and goods without any authority to sell, he may be convicted under section 3170 of the Code; but if he was the agent of his employer, and had authority as such agent to furnish goods to customers, he can only be indicted and convicted under section 3143. If, however, he obtained his agency with the felonious intent of stealing the goods, he may be convicted under section 3170.

FROM the City Court of Mobile, on points reserved as novel and difficult. Hon. ALEX. MCKINSTRY, presiding.

THE indictment in this case, which was found at the October term, 1854, of the City Court, charges, "that John Case feloniously took and carried away from a store-house" certain enumerated articles, whose value is specified, and which are alleged to be the "personal property of William S. Crockett." Having been found guilty by the verdict of the jury, the defendant moved to set aside the verdict, and also in arrest of judgment, on the ground that the jury had failed to assess the value of each article separately, but had assessed their aggregate value at $18. This motion the court refused, but

reserved the question presented as novel and difficult under the Code, and certified it to the Supreme Court for decision.

The bill of exceptions also discloses the following facts:

"The State introduced one Crockett as a witness, who testified, that, seeing an advertisement in the newspapers by the prisoner offering to sell out his store, he called upon him about the last of June or first of July, 1854, to make inquiry respecting it; that he had never seen the prisoner before to know him; that he called again on the prisoner on the third of July, when the prisoner agreed to take, and Crockett to give, $800 for the goods in the store, in a lump as they were—$400 cash, and the balance to be secured by two notes, of $200 each, with security, payable the first of November and the first of September ensuing; that the parties then immediately proceeded to take an inventory of the goods, in order that Crockett might learn the selling prices; that this labor was concluded on the morning of the 4th of July, when Crockett paid, and Case accepted, the $400 in cash; that while the negotiations for the purchase of the goods were pending, on the morning of the third of July, before closing the bargain, the prisoner, at the request of Crockett, sent for the owner of the house in which the goods were, viz., Mrs. Julia Soto, from whom Case had rented it, in order that Crockett might rent the said house, which consisted, besides the room devoted to the store, of apartments above, used as a dwelling-house and then occupied by the prisoner's family,—it being the understanding of the parties, that the prisoner's family were to move out, and Crockett's to move in; that Mrs. Soto did not come, but her son came, and, in the presence of the prisoner, consented that Case might rent the house, and Case then hired the house to Crockett for the balance of the year, the rent to commence from the first of July, 1854; that Crockett has ever since, pursuant to said contract, paid the rent to Mrs. Soto; that after the $400 in cash were paid, as above stated, Crockett remained about one hour in the store by himself, officiating behind the counter and supplying goods to customers; that the prisoner then came in, and asked Crockett to go down town with him, to have a bill of sale drawn, and the notes executed, to which Crockett agreed; that Crockett proposed to shut up the store during his ab-

sence, when the prisoner suggested, for Crockett's benefit, that his (the prisoner's) wife had better tend the store for that interval, lest customers might be diverted from the store by seeing it closed, to which proposal Crockett assented, and proceeded down town with the prisoner; that the parties were absent on their errand until late in the afternoon, without effecting their purpose, owing to the prisoner's not succeeding in getting such a bill of sale drafted as he would express himself satisfied with, when finally Crockett returned to the store alone, and remained there some time, and sold some goods to customers; that Crockett then, being about to go home, said something to the prisoner about shutting up the store, when he again suggested that it would be better for him (Crockett) to leave him (prisoner) in charge during the evening to keep it open, so that the store might not lose custom; that Crockett assented, and went home, and on the next morning early (the fifth of July) he came to the store, and was admitted by the prisoner, who unlocked the door from the inside; that the key had never been delivered to him by the prisoner; that when he came in, he saw that some goods which were there the day previous were missing, but he said nothing about it at that time; that about 9 o'clock the prisoner requested him again to go down town again to execute the notes, saying that he wanted the matter closed, but Crockett refused to go until some of his family, who were to move into the dwelling part of the house that day, came; that the prisoner expressed himself urgently to Crockett, when the latter offered to pay the cash then rather than go out, and finally they went down town together, to the store of Chamberlain, whom Crockett had proposed as his endorser; that Chamberlain declined to endorse the notes, but stated to the prisoner, that he was acquainted with Crockett, and that the notes should be paid; that the prisoner expressed himself satisfied with this, and executed a bill of sale of the goods, which was left with Chamberlain and executed in the absence of Crockett, who went back to the store where the goods were immediately after executing his notes, and before the bill of sale was executed by the prisoner.

"Chamberlain stated, on his examination, that he was under the impression that the understanding of the parties was,

that the notes, with security, should be given before the bill of sale was executed, but he could not say what was the understanding of the parties in regard to the possession of the goods in the meantime. Crockett testified, that he considered his possession complete from the time he paid the $400; that the prisoner never came about the store after the fifth of July but busied himself, as he had been previously, in removing, to make room for Crockett's family, some of his furniture from the larger room of the dwelling part of the house, to a smaller room, which it had been agreed the prisoner should retain to put his furniture in until he had a chance to carry it away; that the prisoner's family left the house on the 6th or 7th; that up to the 5th of July, the keys of the house and the house continued as usual in the possession of the prisoner.

"There was other evidence. On this evidence, the prisoner's counsel requested the court to charge the jury, that although they may believe that the contract was complete on the 4th of July, and the title to the goods vested in the prosecutor, and the defendant stole the goods; yet, if they believe that the control of the house and store was left with the prisoner until the 5th of July, then, in the interim between the 4th and 5th, if the defendant took the goods from the store-house, of which he had the key, possession, and control, then he is not guilty of stealing from a store-house, within the meaning of section 3170 of the Code. This charge the court refused, and charged the jury, among other matters, that if they believed from the evidence that the defendant was guilty of the larceny of the goods, as charged in the indictment, they must ascertain whether they were taken from a store-house or not—if not taken from a store-house, the offence could not be more than a simple larceny; but if they found that the house was a store-house, they must then ascertain whether the larceny was committed before or after the store-house was delivered to Crockett by Case—if they found that the larceny was committed before the hiring and delivery of the store-house to Crockett, the defendant would be guilty of simple larceny only; if, however, they found that the larceny was committed after the store-house had been rented and delivered to Crockett, then the defendant would be guilty of the statutory offence of larceny from a store-house.

"The presiding judge, being of opinion that the questions arising on the refusal to charge as requested and the charges given are novel and difficult, and should be reserved for the opinion of the Supreme Court, has directed the execution of the sentence to be delayed until the 10th day of March, A. D. 1855, and, at the request of the prisoner, here refers the questions therein for the consideration of said Supreme Court."

The refusal to set aside the verdict and arrest the judgment, the charge given, and the refusal to charge as requested, are now assigned for error.

E. S. DARGAN, for the prisoner:

[Mr. Dargan argued orally at the bar the point presented by the motion to set aside the verdict because the jury had assessed the aggregate value of the stolen articles, but he submitted no brief of his argument on that point. He also submitted a written argument, in which he made the following points.—REP.]

Under the Code, it is made the duty of this court, to examine all the errors in the record, even though they are not specially assigned; and the motion in arrest of judgment tests the sufficiency of the indictment. Is it not defective, in that it does not allege who was the owner of the house from which the goods were stolen? Such is certainly the law in England.—Barb. Crim. Law, 187; 3 Chitty's Crim. Law, 949. The Code does not in language require that the owner of the goods should be alleged, yet it is necessary that their ownership should be averred; so, also, it does not in words require an allegation of the ownership of the house, yet it is necessary.

Section 3143 of the Code punishes all clerks and agents who fraudulently convert to their own use the goods of their masters which have come to their possession in consequence of their employment. It is the employment, and not the compensation, that determines the question of the relation existing between the clerk, or agent, and the owner of the goods. That the want of compensation for the agency does not affect the relation, is fully established by the following cases: Rex v. Smith, 1 English Crown Cases, p. 516; Bar-

ker's case, Dow. & Ry. 19, referred to fully by Mr. Roscoe in the last edition of his work on Criminal Evidence, (top) pp. 440, 441; 6 Car. & P. 626. Neither can the length of time the relation has existed vary the case. The sole question is, Did the relation exist at the time of the conversion? If it did, the party must be liable. The true distinction between an agency and a bare charge is this: one has powers, the other not; and these powers cannot be made to depend upon the compensation the agent is to receive for executing them, nor to the length of time such powers have existed. Is there any evidence here, as disclosed by the bill of exceptions, which tends to prove that Case was entrusted with the power of an agent? It is shown that he and his family occupied the room above the store,—that the key was left with him, and the store open and in his charge, *to prevent the loss of custom*. This being the object and reason of the power confided to him to keep open the store, that power, to be effectual, must enable him to carry out that object; for it is a correct rule, that a general grant of a power, unless there are express restrictions that defeat the exercise of the power, must be so construed as to carry out the object of the grant. If the object here of leaving the store open in charge of Case, and the key in his possession, was to prevent the loss of custom, how could this be done without supplying such customers as might call with goods? The evidence, then, at least tends to show that the defendant was authorized, if it became necessary to prevent the loss of custom, to sell goods; and if so, he was a clerk or agent under section 3143, and cannot be convicted under section 3170. The charge, therefore, as it withdrew from the jury the consideration of the question of agency *vel non*, and assumed that the defendant might be convicted independently of that question,—was erroneous.

M. A. Baldwin, Attorney General, *contra*:

1. The offence was either larceny, or embezzlement. Could the defendant be convicted for embezzlement under section 3143 of the Code? Our statute is very nearly the same as the 7th and 8th Geo. IV. ch. 29, § 47, cited in Roscoe's Criminal Law, p. 437: and it has been held under that statute, that no casual procuring a person to receive a sum of money

will render him "a person employed for the purpose, or in the capacity, of a clerk."—Cases of Nettleton, Freeman and Burton, reported in Roscoe's Criminal Law, pp. 437 to 444; all of which were held not to be cases of embezzlement. In the case at bar, the prisoner's attention to the prosecutor's store was a mere casual one: he was not employed as clerk, or agent, and therefore it cannot be embezzlement.

2. Is it a case of larceny? It may be said that the possession was lawful, and that no subsequent conversion of the property could make it larceny, unless the *animus furandi* existed at the time the prisoner came into possession; and that this is the law, is not intended to be denied. It is a clear maxim of the law, (2 East's P. C. 564, 682,) that when one has the bare charge or custody of the goods of another, the legal possession remains in the owner; and the party may, in fraudulently converting the same to his own use, be guilty of trespass and larceny. Thus, a butler, who commits larceny of his master's plate; a shepherd, of the sheep; a servant, of the goods entrusted to his possession.—The People v. Call, 1 Denio 120; United States v. Clew, 4 Wash. C. C. 700; State v. Self, 1 Bay 241; Commonwealth v. Brown, 4 Mass. 580; State v. Gorman, 2 Nott & McC. 90; Commonwealth v. James, 1 Pick. 375; Roscoe 600; 1 Hale's P. C. 505; 1 Leach 266.

3. If it be larceny, is it larceny from a store-house under section 3170 of the Code? The case of Chambers v. The State, 6 Ala. 856, is not applicable to this; that case was under a statute which required an entry into the house; and the prisoner being a lodger, the court held that an indictment would not lie where the entry was permissive.—Clay's Dig., p. 425, § 55. But our statute against larceny from a store-house, &c., is very similar to the English statute of 12th Anne, st. 1, ch. 7, (cited in 2 East's P. C. 629,) and does not require an entry; and, like that, it was made to guard against servants and clerks, as well as strangers.

4. Stealing from a dwelling-house by the owner of the dwelling, has been held larceny under the statute 7th and 8th Geo. IV. ch. 29, § 12.—1 Russ. on Crimes, p. 853; 1 Car. & Kir. 147. It may be doubted whether the authorities generally go to that extent, but they certainly include all other per-

sons than the owners themselves.—Roscoe, p. 597; 1 Russ. 417; 1 Moody's C. C. 89. In this case, the prisoner was not the owner, but merely the occupier of the up-stairs portion of the house.

5. It is not necessary that the value of the goods should be assessed at all, much less each article separately: it has nothing to do with the prisoner's guilt.—13 Ala. 157.

CHILTON, C. J.—The prisoner was indicted and convicted of larceny from a store-house. Several articles, consisting of shoes, thread, cloth, &c., are alleged to have been feloniously stolen by him. The jury found the aggregate value of the goods to be eighteen dollars; but did not assess the separate value of any article. The prisoner moved to arrest the judgment for this reason, but the court overruled his motion, and certified the point to this court.

We think the decision of the court upon this point was correct. There is no essential difference between the provision contained in the Code, and the statute contained in Clay's Digest, and which we construed in Jones v. The State, 13 Ala. 153. In that case, no value was found; here, the aggregate value. As the object of the statute was, to enable the court to render judgment against the prisoner in favor of the party to whom the goods belonged, and as no judgment can be rendered unless the verdict finds the separate value of each article, the two cases stand upon the same ground. In neither could a judgment for the price of the goods be rendered against the prisoner. But to allow *him* to take advantage of this, when the omission has not even the most remote bearing upon his guilt or innocence, and when he is put in a better condition by the omission, would be to disregard the numerous decisions of this court which hold, that a party cannot reverse a judgment which could not possibly have worked any injury to him.

2. As respects the ruling of the primary court in the instructions given to the jury: We think there was some evidence *tending* to prove that the prisoner was the agent of Crockett to whom he had sold the goods. Whether this evidence was sufficient to establish this fact, was a question which the jury should have passed upon, and which is virtually excluded from their consideration by the charge.

If the prisoner was a mere servant of Crockett, having the charge of the goods without authority to dispose of them for Crockett and as his agent, then he is properly convicted under this indictment; but if he was Crockett's agent, with power not only to keep the store open that customers might not be lost to the establishment, but to furnish goods to such customers in behalf of his principal, Crockett, then he falls within the influence of section 3143 of the Code, and must be tried under that section.

The line of distinction between a servant and an agent, who comes under the character of bailee, as respects the offence of larceny, is not very clearly drawn by the books; yet they all agree, that very important results depend upon it. If a servant steal the goods of his master, left in his charge, he was by the common law guilty of larceny. If, however, an agent who is a bailee embezzle them, not breaking the bulk, he was considered as guilty of a breach of trust merely.

Without entering at large upon the discussion of the distinction in this place, it may be sufficient to say, that if the goods were left in charge of the prisoner merely to keep with the store-house or room, and without any superadded duty respecting them, (as, for example an authority to sell and dispose of them,) he must be regarded in the light of a servant; but if, in the contemplation of the parties, the prisoner had authority to proceed and sell the goods to customers, on behalf of the prosecutor, Crockett, under a contract, express or implied, to account for the proceeds, we are unable to perceive upon what principle he could be distinguished from agents or factors, *pro hac vice*, charged with the sale of merchandise as in ordinary cases. It does not require that there should be a special contract, fixing upon compensation, or limiting the period for the termination of the agency. We must have regard to the nature and character of the service or acts to be done; we must determine whether the prisoner was substituted, in the matter of the custody and sale of the goods, in the place of the principal, invested with discretion in the transaction of the business as his agent, or bailee, and binding the principal by his acts done within the scope of his employment; or whether, as a mere servant, he was to act as he was acted upon, or directed by, the master—in other words, whether he

had more than the bare charge of the house and goods to keep them for the master, and to abide his bidding in reference to them.—3 Archb. Cr. Pl., (by Waterman,) pp. 443, *et seq.*

The court lost sight of this distinction in its charge, and the effect of the charge is, to exclude from the jury the consideration of the evidence tending to prove an agency, and in this view, such instruction was erroneous.—Dill, guardian, &c., v. Camp, 22 Ala. 249; Edgar v. McArn, *ib.* 796; Holmes v. The State, 23 *ib.* 17.

If the prisoner was an agent, as contemplated by section 3143 of the Code, he must be convicted, if at all, under that section. He is then guilty of petit or grand larceny according as the jury may ascertain the value of the articles stolen. On the other hand, if he be a mere servant, and not an agent within the meaning of the section above referred to, he may be found guilty under section 3170, for stealing from a storehouse. He is also guilty under this last section, if *at the* time he obtained his agency he did so with the felonious intent of stealing the goods.—2 Waterman's Archb., p. 384, note.

Judgment reversed, and cause remanded.

STANLEY & ELLIOTT *vs.* THE STATE.

1. Whether a person is "a man of known intemperate habits," is a question of fact to which a witness may depose.
2. Under an indictment for retailing without a license, (Code, § 1059,) evidence that the intemperate habits of the person to whom the liquor was sold were generally known in the community, is irrelevant and inadmissible: the fact that his intemperate habits were generally known in the community, does not justify the inference that they were known to the defendant.

APPEAL from the Circuit Court of Limestone.

Tried before the Hon. JOHN E. MOORE.

THE indictment in this case, which was found at the September term, 1853, of the Circuit Court, is as follows:

"The grand jurors of said State upon their oaths present, that Henry Stanley and William B. Elliott, late of said county, on the 20th day of July, A. D. 1853, in the county aforesaid, did sell spirituous or vinous liquors to one John G. Russell and others, without first having obtained a license from the Probate Court of said county for that purpose, contrary to law, and against the peace and dignity of the State of Alabama."

On the trial the State introduced said John G. Russell as a witness, who testified, "that, within twelve months prior to the finding of the indictment, he frequently bought whiskey from the defendants, in quantities not less than a quart, which he took home to drink; that he never bought whiskey from them in quantities less than a quart, and had never bought any to drink on the defendants' premises. The State then introduced one James M. Lane, who testified, that he had been for a long time acquainted with said Russell, and that he (Russell) was a man of known intemperate habits. To this testimony the defendants objected, on the ground that the witness must state the actual habits of said Russell, and leave it to the jury to determine whether or not they amounted to intemperate habits; but the court overruled the objection, and admitted the testimony, and the defendants excepted." Several witnesses for the State testified, "that said Russell was generally known in the community to be a man of intemperate habits"; to which testimony, in each case, the defendants objected, and also excepted to the ruling of the court in admitting it.

The defendants asked the court to charge the jury, "that they should not find defendants guilty, unless they find that said Russell was a man of known intemperate habits, and that his habits were known to them when the whiskey was sold to him"; which charge the court gave, but charged the jury also, that if they found from the evidence that said Russell, at the time he purchased the whiskey from the defendants, was a man of known intemperate habits in the community from the use of liquor, then they might from this evidence infer a knowledge on the part of defendants; and to this charge the defendants excepted. The court charged the jury, also, that they must disregard the testimony of Lane and the other wit-

nesses founded upon mere opinion, and could only find the defendants guilty upon facts; that unless the evidence was that Russell was a man of known intemperate habits from an intemperate use of spirituous liquors, they must find for the defendants."

The rulings of the court in the admission of the evidence objected to, and in the charge given, are now assigned for error, together with other matters not necessary to an understanding of the points here decided.

ROBINSON & JONES, for the appellants, contended,—

1. That it was not permissible to establish the habits of the person to whom the liquor was sold by the kind of evidence adduced in this case; that the testimony of the witnesses, as to Russell being "a man of known intemperate habits," was but the statement of a legal conclusion; that they should have stated the facts which go to make up that character, and left the court and jury to draw the legal conclusions to be deduced from those facts.—Parker v. Haggerty, 1 Ala. 632; Blevins v. Pope, 7 *ib.* 374; Bank at Montgomery v. Parker, 5 *ib.* 736; McCurry v. Hooper, 12 *ib.* 827.

2. That the admission of this illegal evidence was not cured by the withdrawal of it from the jury in the charge of the court.—McCurry v. Hooper, 12 Ala. 828.

3. The court should have given the charge asked without qualification, because the proof fails entirely to show that the defendants were so situated that they must have known Russell's common reputation for intemperate habits: unless this was shown in some way, either by near residence, intimate association, or in some other legal mode, the court cannot presume that the defendants knew it.

M. A. BALDWIN, Attorney General, *contra*, cited the case of Elam v. The State, 25th Ala. 53.

GOLDTHWAITE, J.—The first question presented upon the record is, as to the action of the court in refusing to exclude from the jury the statement of one of the witnesses, that Russell, the party to whom the liquor was sold, was a person of known intemperate habits. It is true, that the

general rule forbids the opinions or legal conclusions of witnesses from being given in evidence; but the question as to intemperate habits is purely one of fact, and it can make no difference in principle, that being the case, that the matter in relation to which the witness is required to speak is made up of more than one fact. That it is a conclusion, is true; but it is no more so than that a man is embarrassed with debt, which we have held to be competent evidence.—Massey v. Walker, 10 Ala. 288. There are legal conclusions which the law alone is authorized to draw, but this is not one of them. It follows, that as the evidence to the fact to which we have referred was proper, and the objection general, the court did not err in overruling it.

We regard, however, the refusal of the court to exclude the evidence that the intemperate habits of Russell were generally known in the community, as erroneous. The question was simply whether these habits were known to the defendants (Elam v. The State, 25 Ala. 53), and unless the evidence tended to bring home this knowledge to them, it was *prima facie* irrelevant. We are aware that the proposition that the general knowledge of a fact in a neighborhood, raises an inference as to the knowledge of each individual in the same neighborhood, has, on more than one occasion, received the sanction of this court; but on a careful examination of the question, we are satisfied that the rule as laid down cannot be sustained. We agree, that where a fact is of such a nature, or is surrounded by such circumstances, as to impress itself upon a neighborhood, or particular community, it will then create a presumption, more or less strong, as to the knowledge of each individual composing the community. This is nothing more than the assertion of the common principle, that whatever affects the whole affects the parts; and the inference then rests upon the positive character of the fact itself, or the attending circumstances. But because a fact is generally known, it does not follow that it is universally known; on the contrary, as that which is within the knowledge of the greater portion of the community, may be properly said to be generally known, the proposition is unsound and illogical, as it makes that which affects a part only, extend to the whole. It has been urged, that the whole theory of circumstantial

evidence is founded on the doctrine of probabilities, and this may be conceded, without admitting the rule as broadly as contended for. It is not enough, however, that there should be a mere probability. A presumption is "an inference as to a fact not actually known, arising from its necessary or usual connection with others which are known."—1 Stark. Ev. 24. Here, the known fact is the knowledge by the community generally; the inference is, the knowledge of the community universally; or, in other words, the proposition may be stated thus: It is usual for the whole community to know, whatever the greater part of the community knows. We have carefully examined the English cases, and can find none which sustains the proposition—nothing in the text writers;—and the entire absence of authority in relation to a rule of such general application, is convincing against its existence.

In this court the doctrine was first advanced in Ward v. Herndon, 5 Port. 382, in which the action was for a deceit, in representing one Simpson to be solvent and worthy of credit, under the influence of which representations the plaintiff sold him goods to a large amount. On the trial, the representations as to the solvency and credit of Simpson were established, and it was also proved that he was generally reputed to be insolvent in the neighborhood in which both the defendant and himself resided. This last evidence was objected to, and on error held to be admissible to bring home knowledge of the reputation to the defendants, on the ground "that no man is presumed to be so much of a recluse as not to know what is generally known and talked of in his neighborhood." While with deference we dissent from the reasoning, we agree that the decision was correct, on the ground that the defendants occupied a relation to the party whom they recommended, which should have put them on inquiry as to his credit; and his general reputation where the law presumed he was best known, was a fact affecting his credit.—Lawson v. Orear, 7 Ala. 784. In The Bank v. Parker, 5 Ala. 731, the same doctrine was again asserted, and Ormond, J., dissented; but it will be found on an examination of that case, that what was there said upon the question we are now discussing was a dictum merely, as the point did not arise upon the record. The subsequent decisions rest entirely upon

the cases we have referred to, treating the question as determined by them, without any examination into their correctness, or any new argument in their support. It is a matter of no small importance, that a rule which goes to the admissibility of evidence in so large a class of cases should be correctly settled; and satisfied that it cannot be sustained as broadly as it has been laid down, we are bound to repudiate it. We would not, however, be understood as holding that the knowledge of a fact by one party will not, in any case, warrant the inference that it was communicated by him to another: we go no further than to deny the general proposition, that the knowledge of an individual as to any and every fact may be inferred from the mere circumstance that it is generally known in his neighborhood.

The views we have expressed apply to the charge of the court, and as it is probable the other questions presented on the record may not arise on another trial, we deem it unnecessary to decide them.

Judgment reversed, and cause remanded.

NOLES *vs.* THE STATE.

1. To excuse a homicide, there must exist on the part of the slayer an actual necessity to kill in order to prevent the commission of a felony or great bodily harm, or a reasonable belief in his mind that such necessity exists.
2. While every citizen has the right to resist any attempt to put an illegal restraint upon his liberty, his resistance must not be in enormous disproportion to the injury threatened. He has no right to kill, to prevent a mere trespass which is unaccompanied by any imminent danger of great bodily harm or felony, and which does not produce in his mind a reasonable belief of such danger.
3. The charges of the court in this case, and its refusal to give the charges asked by the prisoner, tested by these principles, and held correct.
4. Any fact which tends to prove the real motive of the prisoner in killing the deceased, or the purpose of the deceased in going to the prisoner's house, or that the prisoner knew, at the time of the killing, that the deceased and his companions did not intend to commit any felony, nor to do him any great bodily harm, is relevant evidence.

5. A verdict, finding the prisoner "guilty of murder in the first degree, and penitentiary for life," is sufficient to support a judgment of conviction and sentence of confinement in the penitentiary for life.

ERROR from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

JOSEPH NOLES was indicted, at the Spring term, 1853, for the murder of one George T. Sharp; was tried, and convicted, and sentenced to be hung, but the judgment was reversed at the June term, 1854, of the Supreme Court, and the cause remanded.—See 24 Ala. 672. A second trial was had at the Fall term, 1854, which resulted in another conviction, from which this writ of error is prosecuted.

The bill of exceptions sets out all the evidence, which, with such alterations as are necessary to make it intelligible in print, is as follows:

"James H. Burns, who was the first witness sworn, said, he was an acting justice of the peace in the beat where the prisoner lived, at and before the time, and when the murder was charged to have been committed. Here an affidavit, made before Burns by the wife of the prisoner, and a warrant issued by Burns, were offered by the State, and objected to by the prisoner; which objection was sustained by the court, and both the affidavit and warrant excluded from the jury. The State then offered to prove the fact that the prisoner's wife had made an affidavit against him, and that this fact was communicated to the prisoner; which was objected to by the prisoner, but his objection was overruled, and he excepted. Burns then testified, that Mrs. Noles had made an affidavit before him; that he read the affidavit to the prisoner, who demanded an investigation; that he told the prisoner he had no constable or officer to arrest him, and that he would not try him unless he was regularly arrested, but, if he would surrender himself to some one, he (Burns) would appoint such person constable and investigate it; that Noles replied, he would see about it, and then left; that this was on the morning of the day Sharp was killed. The prisoner again objected to this evidence, and moved to exclude it; but the court overruled the objection, and the prisoner excepted. Burns also testified, that both Sharp and Noles were in the village of

Burnsville on that day; that Sharp at first refused, but, after being pressed, agreed to go and arrest Noles; that he authorized him to go by appointing him special constable, there being none in the beat; that he gave him the paper he had issued, and Sharp said that he would go. The prisoner objected to so much of what this witness said, saying that he gave Sharp authority to go, and that he gave Sharp the paper he had issued; but the court overruled the objection, and the prisoner excepted. Burns said, this was after Noles had talked with him, and that Noles was not present; that Sharp went off towards Noles's house; that this was in the morning of the day on which Sharp was killed; that Sharp consented at the solicitation of others. He said, a young man named Cole, then a clerk in his store in Burnsville, had a double-barreled gun in the store, which the young men sometimes hunted with, and which was kept loaded at night; that this young man (Cole) was now dead; that he (Burns) did not see the party when they started to go to Noles's house, nor did he examine the gun after the killing of Sharp, nor did he know that this was the gun Sharp had at the time he was killed.

"Lewis Kirkland testified, that he was in Burnsville on the day Sharp was killed; that Noles, in the morning of that day, was in Burnsville, and had a quarrel or difficulty with a man by the name of Perry, in the house of Mrs. Kelly; that Mrs. Kelly requested Sharp to take Noles out of her house; that Sharp went into the house, and talked with Noles, and they came out in a friendly manner; that Noles then went off towards home; that shortly after this Sharp summoned witness, with six or seven other persons, to go and arrest Noles, who lived some short distance from Burnsville; that when Sharp and his company got within forty or fifty yards of Noles's house, Noles came out into the yard, with his gun in his hand, and ordered Sharp and his party to stand off; that he said, if we abused him, he would shoot some of us; he said to them, 'they were a drunken, rowdy set, and if they would go away and send some old men, he would go with them, or, if they would send a ten-year-old boy, he would go with him.' This witness said, he had not been drinking, *but that Perry had, but was not drunk, and none were, and was the man Noles had quarreled with that morning in Burnsville (?)* that neither Sharp,

nor his company, had any gun or other arms that he saw or knew of; that when Noles ordered them to stop, they did so; that Sharp told Noles not to shoot, that they would not rush upon him, but that he would return in the evening and arrest him; that Noles replied, he would be at home; that Sharp and his party then left; that they were all peaceable and quiet men, and none of them drunk. He further testified that Sharp and his company returned to Burnsville, and Sharp then got a double-barreled gun, but (witness?) did not know where he got it from; that Sharp summoned Wm. B. Hall and a man named Coxe (these men were older than the others were) to return to Noles's house, for the purpose of arresting Noles; that the gun was given to witness, which he carried until they got in sight of Noles's house, when he gave it to Sharp; that the company rode on, Hall and Coxe in front some thirty or forty yards ahead of Sharp; that witness was behind Sharp, some ten or fifteen yards off, on his left; that Noles came out into the yard; that he then had his gun in his hand, and ordered the company to stop, raising his gun to his face, and saying, if they advanced, he would shoot some of them; that he only heard one command to stop; that they all stopped, and Sharp, who was then sixty or seventy yards off, stopped, and dismounted quickly on the left side of his horse, holding the gun in an elevated position in his left hand about the middle of the gun, and the bridle in his right hand; that Sharp's horse pulled back; that he saw the gun of Noles waive, as if directed from Hall and Coxe, who were on the left of Sharp, so as to bear on Sharp; that he kept his eye on Sharp, expecting him to shoot, as he had the warrant and gun; that as soon Sharp was on the ground, and fairly erect, Noles's gun fired; that Sharp did not present his gun to shoot, as he saw; that he could have shot very quick, if Noles had not shot him first—that he only had to bring his right hand to the gun, and he would be ready to shoot; that he heard but one report; that he did not examine Sharp's gun, nor did he know whether it was loaded, although he carried it a part of the way; that Sharp lived about ten minutes after he was shot; that Noles fled.

"Wm. B. Hall went to Burnsville on the day Sharp was killed, and between 2 and 4 o'clock of that day Sharp sum-

moned him to go and aid in arresting Noles; that he went, and several other persons also went; that Sharp had a double-barreled gun with him; that witness and a man by the name of Coxe were riding together, in advance of Sharp and the balance of the company some twenty or thirty yards; that when he first saw Noles, he had his gun in his hand, and ordered the company to stop; he said he would not be intruded on, and if they did not stop he would shoot; that Sharp and the company behind stopped, but witness and Coxe did not, but advanced, and witness saw from 'the cut of Noles's eye' he was about to shoot, and attempted to throw himself from his horse in such a way as to avoid being shot; that he called out, 'He is about to shoot,' or 'We are about to catch it'; that Sharp was behind him some distance, and at this time he did not see him, but he saw Noles move his gun quickly, and the gun fired, and Sharp was killed; that Noles fled, and he pursued him some distance, but did not overtake him; that he heard but one report; that the company went up to Noles's house in a peaceable and quiet manner—did not attempt any personal violence on Noles; does not remember saying, 'Shoot, he is going to shoot us'; he had no arms with him.

"C. R. Coxe testified, that he was summoned by Sharp, in the afternoon of the day on which Sharp was killed, to go and aid in arresting Noles; Sharp had a gun, and witness had a pistol in his pocket, but did not draw it; witness and Wm. B. Hall went together, and in advance of Sharp and the rest of the company some thirty or forty yards; when they had got within some twenty or thirty yards of the house, he saw Noles as if he came around one corner of the house; that he did not then have his gun in his hand, and he forbid the approach of the persons any further, saying that he would not be intruded upon; Sharp, and the party behind witness and Hall, stopped; Hall said to witness, 'Let us go on'; they did so, when Noles stepped to the corner of the house he had come around; and took up his gun, and ordering them again to stop, and saying, if they did not he would shoot them; the gun was then presented, when Hall immediately made an effort to get from his horse, and cried out, 'Shoot him, he's going to shoot us'; at this moment Noles passed his gun from witness and Hall towards Sharp, and very quick the gun fired; witness said he

distinguished two reports, but he thought one at the time, and still thinks that the report was from the echo at the house; after the shooting he found Sharp's gun on the ground, near where he was shot, the right hammer down, and the cap was either burst or off; he did not examine otherwise whether the gun was loaded.

"F. Carson was present in the morning when the company first went to arrest Noles; he forbid their approach, and said, that they were a drunken set, and he would not be intruded on; when ordered to stop, they did so, forty or fifty yards off; Sharp said, he would not arrest him then, but would return in the evening and do so; Noles said, 'You will find me here'; the party had no gun, or other arms,—they were peaceable and quiet,—were not drunk; they all went back to Burnsville, and Sharp got a gun, and summoned some more men, (Hall and Coxe,) and when they came in sight of the house witness and several others were behind Sharp ten or fifteen yards, and were off to his right; Hall and Coxe were some distance before; the first witness saw, Noles was in the yard, with his gun, and ordered the party to stop, and said, if they rushed on him he would shoot some of them; his gun was pointed at Hall and Coxe; Sharp, who was then on his horse, got down quick, and Noles then waived his gun from Hall and Coxe to Sharp; this was not until Sharp had got down, or had started to get down from his horse, and the gun did not fire until Sharp was fairly on his feet; witness did not hear any one say, 'Shoot him'; he was behind Sharp, who had let his horse go before he was shot; he only heard one report.

"Mr. Lassiter was with the party in the morning, and proved about the same as the other witnesses; was present, also, when Sharp was killed; the first he saw of Noles, he was in the yard, with his gun in his hand presented; he said, 'Stop, or I will shoot',—he would not be rushed on, and the gun fired nearly as soon as the words were out of his mouth; he did not hear any body say, 'Shoot'; the gun was not pointed at Sharp until he got down, and when he got down he had his gun in his left hand; witness was behind Sharp some thirty paces; Sharp had let his horse go, with the bridle reins over his neck, before he was shot, and was on the ground when he was shot; witness heard but one report.

"Dr. Gee examined the wounds of the deceased; his death was produced from the wounds he examined; they were in the left side; there were two wounds on his left arm, both inflicted by one shot,—where the shot entered, and where it passed out, making two wounds; this wound was about two or two-and-a-half inches below the point of the shoulder where it passed out; where this shot entered the arm it must have broken the bone, if the arm had been down; it could only have taken the direction it did when the arm was raised. Dr. Gee's opinion was, that this arm was raised level when this shot struck it; that it passed up the arm, and went out at the point of the shoulder.

"Mr. McCain was not present at the shooting; followed the prisoner into the State of Georgia, where he arrested him, and brought him back to Alabama. B. T. Sharp was brother to the deceased; saw Noles when he shot; was one hundred and fifty yards off still, behind all the company; thinks his brother's gun did not fire; the horse deceased rode was a very wild horse, and deceased knew he could not shoot off of him. This was all the evidence given by the State. It was then admitted by the State, that Mrs. Barrett, if present, would prove that she heard two distinct reports of guns, in quick succession, between a quarter and a half-mile from the place, and at the time Sharp was killed. West proved, also, that Hall, one of the witnesses for the State, told him that, when they went to Noles's, they did not want to take him, but wanted him to go away.

"His Honor, among other things, charged the jury:

"1. That Sharp and his party, in going to the house of Noles to arrest him, not having any warrant to do so, and no charge of felony against him, were all trespassers; and that the prisoner had the right so to consider them, and to treat them as such.

"2. But, notwithstanding this, if neither Sharp, nor his company, intended to commit any felony against Noles, (as by killing him, or doing him great bodily harm, stealing his goods, or burning his house, or the like,) and that neither Sharp, nor any of his company, said or did anything which might induce Noles to apprehend that they intended to commit a felony, or such things as are above referred to,—then

Noles could not justify killing Sharp, but would be guilty at least of manslaughter, and of murder if the killing was of malice, as the court will hereafter explain.

"3. That the law regarded the liberty of the citizen as sacred, and every arrest of a citizen without warrant (where no felony actually committed was charged, and where the arrest was not to prevent the commission of a felony) was a trespass, and such arrest was unlawful; that such unlawful arrest was, in law, a great provocation, sufficient to excite and heat the blood of the party arrested; and that, if, under such heat and excitement, the party about to be arrested, to prevent it, kills the trespasser,—it would be only manslaughter.

"4. But, if in this particular case the prisoner knew and believed that Sharp and his party only intended to arrest him, and carry him before Esquire Burns, to answer the complaint to keep the peace, and to prevent this he killed Sharp, with what the law calls malice, as already explained to the jury,—then he would be guilty of murder, *notwithstanding the unlawfulness of the arresting so intending to carrying him before Justice Burns.*

"The prisoner excepted to the charge of the court, and wrote out and asked the following charges:

"1. If the deceased and his company went to the prisoner's house in order to arrest him, having no warrant or authority to do so, then they were all trespassers, and the prisoner was not bound to submit to their arrest, and, in forbidding their approach, he did no more than he had a right to do; and if the company, or any of them, refused to stop, but still advanced, intending to arrest him, and he could only prevent the arrest by taking up and presenting his gun at the parties so advancing, he had the right to do so; and if, when he so presented his gun, still forbidding their approach, one of the party called out to Sharp to shoot the prisoner,—if Sharp had a gun, and dismounted immediately, and did then any act or acts calculated reasonably to satisfy the prisoner that he was then in danger of being immediately shot by Sharp,—then it was lawful for the prisoner to shoot, and if he killed Sharp, it was neither murder nor manslaughter, and the prisoner was entitled to an acquittal. This charge the court gave.

"2. That the person of every free white man is sacred in

law, and every arrest, or attempt to arrest him, without warrant or other legal authority, is a violation of his rights, to which he is not bound to submit, and if he can only prevent such unlawful arrest by taking the life of the aggressor, he has a right to do so; therefore, if Sharp and his company, having no warrant or other legal authority to arrest the prisoner, went to his house, intending to arrest him, and then and there attempted to arrest him, and such arrest could only be prevented by taking the life of Sharp, then the prisoner is entitled to an acquittal. This charge the court refused, and the prisoner excepted.

"3. If Sharp and his company went to the prisoner's house to arrest him, without warrant or other legal authority, the prisoner was not bound to submit to that arrest, nor was it necessary for him to fear or believe that Sharp and his company intended to commit a felony, or to commit such violence on his person as to produce to him great bodily harm; but, in order to preserve, protect, and defend his liberty, he had a right to resist and prevent this unlawful arrest; and if, while doing so, Sharp and his party still persisted in their determination and attempt to arrest the prisoner, then the killing of Sharp is not more than manslaughter at the most; and if the arrest of the prisoner could not be prevented otherwise than by killing Sharp, then such killing is neither murder, nor manslaughter, and the prisoner should be acquitted. This charge, as a whole, the court refused, and the prisoner excepted.

"4. If Sharp and his company went to the prisoner's house, intending to arrest him on any charge not amounting to felony, and the prisoner had fled, or refused to submit to the arrest, then, if Sharp and his company could not arrest him without taking his life, and the prisoner had been killed by Sharp,—then such killing would have been murder in Sharp and his company, so consenting to the same. This charge the court gave."

(The fifth charge requested is not stated in the record.)

"6. When a man acts under a necessity, malice is not implied from such acts, but such acts are referred to the necessity under which he acts. This charge the court gave as asked."

The jury, by their verdict, "say, they find the prisoner guilty

of murder in the first degree, and penitentiary for life"; and the court thereupon sentenced him to confinement in the penitentiary for life.

All the matters covered by the exceptions above stated, together with the judgment rendered on the verdict, are now assigned for error.

THOS. WILLIAMS and GEO. W. GAYLE, for plaintiff in error:

1. The court erred in admitting parol proof that the prisoner's wife had made an affidavit against him, when the court had just excluded the affidavit itself.

2. The court erred, also, in permitting Burns to testify that he had authorized Sharp to go and arrest the prisoner, and that he gave him the paper which he had issued, when the court had previously excluded the warrant itself.

3. As to the charges given and refused: Self-defence includes the right "to preserve, protect, and defend" personal liberty, as well as life, limb, or property; and therefore, "to preserve, protect, and defend" his personal liberty, a man has the same right "to repel force by force" that he would have to defend life, limb, or property.—Constitution of Alabama, (Code, p. 30,) §§ 9, 11; 12 Ala. 840; 8 Pick. 133; 8 Durn. & E. 79; 3 Ired. 92. Every arrest of a freeman without warrant, unless it be under a charge of felony, is unlawful, and he may use as much force as is necessary either to prevent the arrest, or to effect his escape if arrested; and if he cannot prevent this unlawful arrest, or regain his liberty, but by slaying the aggressor, he has the right to do so, and cannot be convicted of any offence for so doing—at least, not of murder in any degree.—Stevenson's case, 10 State Trials 462; Tooley's case, 2 Ld. Raym. 1296; Pickett's case, 3 Camp. 68; 1 Stark. Rep. 246, or 2 Serg. & L. 376; Thompson's case, 2 Moody's Crown Cases, p. 80; Curvan's case, *ib.* 132; 1 Hale 455-6; Cro. Car. 371; Cook's case, *ib.* 537; Fost. 319; 8 Pick. 133; 1 Russ. on Crimes, m. p. 630-1; Roscoe's Cr. Ev., m. p. 751; 1 East's P. C. 310; 5 Yerg. 459; 1 Mann. (Mich.) 451; Wharton's Am. Cr. Law, p. 254.

M. A. BALDWIN, Attorney General, *contra:*

1. There was no error in permitting witness Burns, the jus-

tice, to state that the wife of Noles, the prisoner, had made an affidavit before him, and that he (Burns) communicated this fact to prisoner, and read him the affidavit. No ground of objection is stated.—Sally's Adm'r v. Caps, 1 Ala. 121; Planters' & Merch. Bank v. Borland, 5 *ib.* 543; Baldwin v. Carter, 17 Conn. 201; 12 S. & M. 161.

2. The charges given by the court are more favorable to the prisoner than the law really is.

3. Both the second and third charges asked were correctly refused; for, although a man may repel force by force in defence of his person, habitation or property, against all who manifestly endeavor, by violence or suspicion, to commit a known felony, (1 East P. C. 272; 1 Hale P. C. 445; Whar. Cr. Law 254,) yet the law will not justify him in taking life for the purpose of preventing a mere trespass to property, or an assault upon his person, which does not threaten a felony or great bodily harm.—1 East. 287; 1 Russ. on Crimes 519; Whar. 235; Oliver v. The State, 17 Ala. 598; Carroll v. The State, 23 *ib.* 36; The State v. Morgan, 3 Ired. 192; McCoy v. The State, 3 Eng. 454; Commonwealth v. Drew, 4 Mass. 396; United States v. Weltberger, 3 Wash. C. C. 521; The State v. Smith, 3 Dev. & Batt. 117; United States v. Travers, 2 Wheeler's Cr. Cas. 497, 509; The State v. Craton, 6 Ired. 173; People v. John Doe, 1 Mich. 456.

4. Killing an officer for arresting one illegally, is extenuated to manslaughter.—1 Chit. Cr. Law 23; 1 Russ. 519; Whar. 236-7; 1 Russ. 512.

5. If the party killing upon provocation (as for an assault, illegal restraint, and the like) make use of a deadly weapon, it is murder.—1 East P. C. 233; 1 Russ. 515, and notes; Jacob v. The State, 3 Humph. 517.

6. An attempt illegally to arrest a person is no greater trespass and provocation than an assault upon his person. For assaults on the person, no one is justified in taking the life of the assailant, unless to save his own life, or prevent some great personal injury; and the necessity must be imminent, and the party assailed must retreat, unless in so doing he endangers the chances of safety.—Roscoe 770; 1 Russ. 517.

7. The nature of the weapon used must be looked at, to determine the degree of homicide.—Arch. 416; 1 Russ. 520.

8. The charge must be considered in reference to the testimony in the case. The charge asked should have contained a proviso to the effect that Noles had used all means in his power otherwise to save his own life, or prevent the intended harm; such as retreating as far as he could, or disabling his adversary, without killing him, if in his power.—1 Mich. 456; People v. John Doe, *supra*.

9. No arrest had been made or attempted when the killing took place.—4 Mass. 396; 1 Mich. 456.

10. Was the killing under such a necessity, real or apparent, as the law requires before one is allowed to take the life of another?

11. The verdict is plain and intelligible, and that is all that is necessary.—See Code, § 3080; The State v. Stephen, 15 Ala. 534; Nance v. The State, 6 *ib.* 483; Noles v. The State, 24 *ib.* 694; Pettis v. Bingham, 10 N. H. 519; Schlenker v. Bisley, 3 Scam. 483; Bank v. Batty, 4 *ib.* 200; State v. Yancey, 3 Brevard 144; State v. Fuller, 1 Bay 243; Hawks v. Crofton, 2 Bur. 698; Nabors v. The State, 6 Ala. 201; 1 Chitty's Cr. Law 644.

RICE, J.—To excuse one individual for taking the life of another, there must exist a necessity to prevent the commission of a felony or great bodily harm, or a reasonable belief in the mind of the slayer that such necessity does exist. If there is neither the existence of such necessity, nor any reasonable belief of its existence, the law will not acquit the slayer of all guilt.—Oliver v. The State, 17 Ala. 587; Pritchett v. The State, 22 *ib.* 39.

The case of a mere trespass upon the person and liberty of the slayer, which created no reasonable belief in his mind that any of the trespassers would commit any felony or do him any great bodily harm, cannot be allowed to constitute an exception to the foregoing rules. When such trespass is threatened or committed, he has no *right* to kill, unless the unlawful act, when properly and lawfully resisted by him, is persisted in by the trespasser, until it ultimately results either in an actual necessity on his part to kill in order to prevent the commission of a felony or great bodily harm, or in the reasonable belief by him of the existence of such necessity.—

Carroll v. The State, 23 Ala. 28; State v. Craton, 6 Ired. 164.

Believing the foregoing legal propositions to be correct, and being bound to construe the charges and refusals to charge in connection with the evidence, we cannot do otherwise than declare, that there is no error in the charges given, nor in the refusals to charge as requested, of which the prisoner has any right to complain.

We admit the right of any citizen to resist any attempt to put any illegal restraint upon his liberty. But his resistance must not be in enormous disproportion to the injury threatened. He has no right to kill, to prevent a mere trespass, which is unaccompanied by any imminent danger of great bodily harm or felony, and which does not produce in his mind any reasonable belief of such danger. We cannot sanction the charges asked by the prisoner and refused by the court, to the full extent to which they go.

Any fact which tended to prove what was the real motive of the prisoner for killing the deceased, or the purpose of deceased in going to the house of the prisoner, or which tended to prove that at the time of the killing the prisoner knew that the deceased and his companions did not intend to commit any felony, or do him any great bodily harm, was relevant evidence. In this point of view, the evidence excepted to by the prisoner was admissible.

The prisoner did not object to this evidence on the ground that the affidavit and warrant were not produced; they had just been offered by the State, and been excluded on the objection of the prisoner. The only question raised by the objection was as to the relevancy of the evidence as offered; and as it was relevant, there was no error in overruling the objection. If the prisoner had objected on the ground that the affidavit itself and warrant were not produced, and the affidavit and warrant had not then been produced, we would have been called on to decide whether such an objection should have been sustained. But as it is not presented in that way, we do not intimate an opinion on that question.—Allen v. Smith, 22 Ala. 416.

The verdict is sufficient to sustain the judgment and sentence.—Noles v. The State, 24 Ala. 672.

We are fully convinced that there is no error against the

prisoner, in any of the proceedings, which authorizes a reversal of the judgment and sentence pronounced by the Circuit Court of Dallas county; and we affirm said judgment and sentence, and direct said sentence to be carried into execution.

STEWART *vs.* THE STATE.

1. Where three are jointly indicted for an assault with intent to murder, but are tried separately, a letter written by one of them to the prosecutor some time before the commission of the assault, showing malice and ill-will on the part of the writer towards the prosecutor, is not admissible evidence against another who, though *particeps criminis* in the assault, is not shown to have had any connection whatever with the writing of the letter, nor to have acted in concert with the writer, nor to have participated in his ill-will towards the prosecutor.
2. But, *it seems*, if the defendants had entered into a conspiracy to kill the prosecutor, and the letter was subsequently written by one of them to bring on the difficulty, or in furtherance of their common design, it would be admissible evidence against all of them; the act of each, in furtherance of the common design, being deemed in law the act of all.

ERROR to the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

John Stewart, George M. Gordon, and John Gordon, were indicted (under the Code) for an assault with intent to murder committed on one Nathaniel J. Lilly. The defendant Stewart being on trial alone, "the State was permitted to prove what George Gordon said to Mrs. Lilly (wife of the prosecutor) and one Mrs. Roscoe, during the time the offence charged is alleged to have been committed; said Gordon being indicted with defendant, and the proof showing him a *particeps criminis* with defendant, and defendant being present at the time the words were spoken. To this defendant objected, and his objection being overruled, he excepted. It was proved that the offence was committed at the prosecutor's house in the night-time, his family being present. The State was permitted, also, to make proof of the contents of letters

written by said George Gordon to the prosecutor some time before the offence charged is alleged to have been committed; which said letters made no allusion or reference to the defendant, nor to the offence charged against him, and alluded only to the prosecutor's wife, and to the conversation and charges made by her against said Gordon, and were in effect and substance as follows: That the wife of said prosecutor had been using offensive language, and making unjust charges against said Gordon, and that he (Gordon) desired the prosecutor to make his said wife hold her tongue and cease talking about him; that he (the prosecutor) did not know who he was dealing with, and if he had anything against him (Gordon), and wanted satisfaction, he (Gordon) would fight him in any way, from the point of a needle to the point of a cannon. It did not appear in evidence that defendant was in any way concerned in writing said letters, or that he had any knowledge of the writing or sending of them; and they were permitted to go to the jury without any proof of the knowledge or participation of defendant; to which defendant objected, and his objection being overruled, he excepted."

Other rulings of the court were excepted to during the progress of the trial, which it is unnecessary to state; the assignments of error cover all the exceptions shown by the record.

S. R. Blake and Geo. W. Gayle, for the plaintiff in error:

The court erred in permitting the State to prove the contents of the letter written by Gordon to the prosecutor some time before the commission of the assault. The acts and declarations of one defendant cannot bind another, unless they were made or done under a concerted plan, and in furtherance of a common object. The mere declarations of the party cannot establish such concert, nor does the mere participation in the assault. The State should have been held to prove the combination or conspiracy, before the previous declarations of one defendant can bind the other.—1 Phil. Ev. 93, 94; 1 East's P. C. 96, 97; 2 Stark. Ev. 232, 234, 235; Roscoe's Cr. Ev. 76; 6 Term R. 527. The declarations of one defendant, amounting to a mere recital of past events, cannot be admitted to bind another: they must amount to acts in furtherance of a concerted plan and a common purpose, or they must accom-

pany the transaction.—1 Phil. Ev. 95, 97; 2 Stark. Ev. 236. The letter does not appear to have any connection with the transaction, nor with any concerted plan or common purpose; and such connection must appear, either upon the face of the instrument, or by proof *aliunde*.—2 Stark. Ev. 234; Roscoe's Cr. Ev. 79; Foster's C. L. 198; 2 Stark. Cas. 140; Hardy's case, 24 Howell's State Trials, p. 452; 2 Burr's Trial (by Robertson), pp. 538-9; Apthorp v. Comstock, 2 Paige 488; 1 Hawks 442; *Ex parte* Swartwout, 4 Cranch's R. 75; 1 East's P. C. 119; 4 Black. Com. 80.

M. A. BALDWIN, Attorney General, and WILLIAM M. MURPHY, *contra:*

Gordon's letter to the prosecutor did not tend to prove a conspiracy; but it did tend to show the feeling—the design—the malice—the threat of Gordon to commit a felony on Lilly; and afterwards a felony was committed on Lilly by Gordon and others. This letter, then, can be read as an act to show the nature and tendency of the conspiracy alleged, and which, therefore, might be read as the foundation for affecting the prisoner with a share of the conspiracy.—2 Stark. Ev., top p. 235; 1 Green. Ev., § 111; 3 *ib.*, § 93; The People v. Mather, 4 Wend. 261. The distinction is this: After the conspiracy is shown, and the offence committed and proved, that makes the conspirators a unit; and then the letters of any one of them, written to the person upon whom the felony was committed, and in relation to the offence charged, would elucidate the nature of the intent, and would be admissible evidence against all.—4 Wend. 261, *supra;* 2 Esp. Cas. 719. No authority can be found, which, after the conspiracy is proven, excludes the previous acts or declarations of one of the conspirators in relation to the conspiracy; because the proof of the conspiracy makes one act, one offence, and one offender in law. If Gordon was on trial alone, his letter would certainly be admissible against him; and if a conspiracy is shown, in which Stewart was concerned, *he* is Gordon.

CHILTON, C. J.—There is no pretence that the appellant Stewart had any connection whatever with the writing of the letter by Gordon to Lilly, which was read in evidence against

him,—no evidence that he was cognizant of it, or acted in concert with Gordon, or in anywise even partook of the ill-feeling which is evinced by the letter as existing between Gordon and Lilly at the time the letter was sent. Neither does it appear that, at the time when the offence was committed by Gordon, and in which the prisoner participated, anything occurred which could connect the prisoner with this letter by relation. All that does appear is, that Stewart was a "*particeps criminis*,"—that is, as we understand it, the prisoner participated in the assault made upon Lilly by Gordon; but it does not follow from this participation, that he is to be charged with or affected by the wrongful acts of Gordon anterior to that time, which have no connection with the offence intrinsically, and with which he is not shown to have been connected by concert or otherwise. Gordon may have been influenced by the most settled and deadly hostility, and yet the defendant, Stewart, may have acted upon some sudden ebullition of passion, in the absence of all preconceived malicious design. In such case, he might be a *particeps* with Gordon in the assault, and yet not partake of his previous acts evincing his malice. If, however, with a knowledge of this malice on the part of Gordon towards the prosecutor, Stewart entered into a conspiracy with him to kill Lilly, and this letter was written afterwards by Gordon to Lilly to bring on the difficulty, or in furtherance of the common design, then we should not be prepared to hold that it would be incompetent. The rule is, that every person entering into a common design, already formed, is deemed in law a party to all acts done by any of the other parties, before or afterwards, *in furtherance of the common design*.—3 Greenl. Ev., § 93, and cases there cited. This rule, which is generally applicable to the offence of conspiracy, is grounded upon the reason, that by the act of conspiring together, the conspirators have jointly assumed to themselves as a body the attributes of individuality, so far as regards the prosecution of the common design, thus making the act of each a part of the *res gestæ* and the act of all.

But it is very clear, that the acts or declarations of neither party, which occurred before any conspiracy was formed, fall within the principle of admissibility.—3 Greenl. Ev., § 94;

2 Russ. on Crimes (ed. 1853) 696-8; 1 Phil. Ev. (9th ed.) 201; 1 East's P. C., ch. 2, § 37, p. 96; 2 Stark. Ev. 326; Regina v. Murphy, 8 C. & P. 297; Regina v. Shellard, 9 *ib.* 277.

The view which we entertain upon this point shows that the court erred in admitting the proof of the letter written by Gordon to Lilly; and as the other questions which are raised will not likely recur upon another trial, we deem it unnecessary to decide them.

Let the judgment be reversed, and the cause remanded.

JOHN ELAM *vs.* THE STATE.

1. Under an indictment for retailing without a license in the general form allowed by the Code, (§ 1059,) the defendant cannot require the prosecuting attorney to state and elect, before any evidence is offered, for which one of the different varieties of retailing he intends to proceed.
2. But after the State has once made its election by offering evidence of one particular offence, it will be held to that election through all the future proceedings, and on a second trial under the same indictment will not be allowed to offer evidence of a different offence.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. EDMUND W. PETTUS.

THE appellant was indicted at the September term, 1853, of the Circuit Court of Tuskaloosa, for retailing, and was convicted; but having taken an appeal to the Supreme Court at its June term, 1854, the judgment of conviction was reversed, and the cause remanded.—See 25 Ala. R. 53. Another trial was had at the September term, 1854, on the pleas of not guilty and former acquittal; but before any evidence was introduced, as the bill of exceptions states, "the defendant moved the court that the solicitor for the State be required to state and elect for which of the three offences of retailing the defendant was to be tried; which motion was overruled, and the defendant excepted."

"The State then introduced evidence tending to show that

the defendant, in the month of August, 1853, sold a quart of whiskey to one James McDowell; that said James was then, and had been for many years before, a man of intemperate habits; that he then lived in the neighborhood of defendant, and that his reputation in that neighborhood was then, and had been for many years, that of a very intemperate man; that said James was, on the 4th of July, 1853, drunk at defendant's house, and in his presence." The defendant then introduced and read an indictment found against him at the September term, 1853, of the Circuit Court of Tuskaloosa, which was identical in every respect with that under which he was on trial; "and proved that a trial had been had under said indictment at the present term of the court, on the plea of not guilty, and that the verdict of the jury was not guilty,—that a judgment of acquittal was rendered by the court on said verdict, and that said judgment was in full force. He then proved, that the act of retailing sought to be proved by the State on said trial was for selling a half-gallon of whiskey to the said James McDowell, on the 4th day July, 1853, and suffering the same to be drunk on or about his premises; that on the former trial of this cause, when defendant was convicted, (and the conviction reversed and remanded by the Supreme Court,) one of the acts of retailing sought to be proved by the State against him was for selling the said half gallon of whiskey to the said James McDowell on the 4th day of July, 1853, and that the State did not, on said last named trial, offer any proof of the selling by defendant of spirituous liquors by the quart to the said McDowell in the month of August, 1853. The defendant then insisted, that the State should be confined on the present trial to the same acts of retailing for which the defendant was convicted on the previous trial of this cause, and moved the court to exclude from the jury the evidence relating to the selling of said quart of whiskey in the month of August, 1853; but said motion was overruled, and defendant excepted.

The court gave several charges to the jury, which were also excepted to, and which are now assigned for error; but it is unnecessary to state them, as they are not noticed in the opinion. The other assignments of error embrace the rulings of the court above stated.

E. W. Peck, for the appellant, contended,—

1. That the court should have required the prosecuting attorney to elect for which of the three kinds of retailing specified in the statute the party charged was to be tried. Although the Code (p. 244, § 1059) authorizes *any* act of retailing to be proved, yet it does not authorize *every* act of retailing that may be committed, and every kind of retailing, to be successively gone into on the same trial.

2. The State should have been confined, on the second trial, to the same offence of which the defendant had been convicted on the first trial.

3. The evidence sustained the plea of former acquittal, and therefore the charge of the court was wrong. Where the same evidence will support both indictments, *autrefois acquit* is a good defence; and these two indictments being in the same words, and found at the same term of the court, the same evidence would support either.—1 Chitty's Criminal Law, top p. 369.

M. A. Baldwin, Attorney General, *contra*:

1. It is a matter of discretion with the court, whether or not the prosecuting officer shall be compelled to elect for which offence he will proceed. The practice generally is, to refuse such motions, and leave the matter to the option of the solicitor.

2. After the case had been remanded for another trial, I know of no rule of law confining the State to the same evidence that was adduced on the first trial. Any offence against the law of retailing not barred by the statute, and upon which no conviction or acquittal had been had, might be given in evidence on the second trial, whether it had been given in evidence on the former trial or not.

3. Both the charges given are in strict conformity with the decision of this court in 25th Ala. R. 53.

GOLDTHWAITE, J.—We see no error in the action of the court in overruling the motion made by the defendant below, to require the solicitor to state in advance for which of the different varieties of retailing he was to be proceeded against. The indictment, it is true, is general in its form,

but its sufficiency was determined when this case was last here (25 Ala. 53); but the fact that it is general and broad enough, under the Code, to allow evidence of any violation against the law of retailing, is not a sufficient reason for requiring the prosecuting officer to state beforehand the particular offence he intends to prove. At the common law, under an indictment containing but a single count, evidence of either one of several distinct and separate offences might be given in evidence, as in cases of different assaults committed on the same person, different affrays between the same persons, and in many other cases. If a defendant were to announce that he had committed several assaults on the person named in the indictment, and not knowing for which of these assaults the indictment was found against him, ask as a right that the prosecuting officer should state for which one of these offences he intended to proceed, we apprehend the court might very properly overrule his motion. The case at bar may be stronger than the one put, but it depends upon identically the same principle.

We think, however, the court erred, in not confining the State to the same offence in relation to which evidence had been offered on the former trial. The rule of the common law was, that where but one offence was charged, the evidence must be confined to one; and the Code has not changed that principle, and could not, perhaps, do so without violating the constitutional right which the defendant has of having the offence passed upon by a grand jury. It allows, it is true, in certain cases, more than one offence to be charged, even in the same count (§ 3506); and when this is done, evidence as to each offence may be offered. The general form of the indictment allowed by section 1059 of Code, against retailers, does not, if followed, include more than one offence; and the provisions in the same section, which allow any act in violation of the law to be proved under such an indictment, cannot, upon any sensible rule of construction, be intended to mean more than one act. In civil actions, if but one act is charged in the declaration, the plaintiff cannot give evidence of any other; and it is also laid down, that if he prove one, he cannot waive that, and prove another.—Stante v. Pricket, 1 Campb. 473; 2 Greenl. Ev. § 86. In criminal cases, where

the grand jury have by their bill found but a single offence, the presumption is, unless it otherwise appear from the indictment, that the act to which the evidence offered by the State relates, is the one to which the indictment refers; and if that presumption is correct, it would necessarily exclude evidence as to any other. The true rule, therefore, is to hold the State to the act to which the testimony relates, if it can be covered by the indictment, and but one offence is charged. If the prosecuting officer deems it for the interest of the State, that evidence as to different offences should be offered, he must frame the indictment accordingly; which is in every case very easily done. We have laid down the rule generally, and think that, after the election is once made by offering evidence on the part of the State, it holds through all future stages. The same reasons exist for its application on the second trial as on the first. The election once made, in the mode we have stated, becomes an act in the cause, and cannot be separated from it.

Judgment reversed, and cause remanded.

HARRALL *vs.* THE STATE.

1. If the order for a change of venue, in a criminal case, directs the clerk to transmit "the original papers in the cause," it is nevertheless his duty (Code, § 3613) to transmit a transcript; and such order, even if erroneous, is no ground for a reversal of the judgment and sentence of conviction.
2. The failure of the clerk, after a change of venue has been ordered, to transmit a transcript to the clerk of the court to which the trial is removed, and the failure to have the cause entered on the docket of that court at the term next after the order of removal, is no discontinuance of the prosecution.
3. The court to which the trial is removed may (Code, § 3615) issue a *certiorari* to the clerk of the court in which the indictment was found, requiring him to transmit certified copies of any and all papers and entries in the cause, and may order the original papers to be returned to him.
4. It is not necessary that an indictment, under the forms prescribed by the Code, should be signed by the solicitor.
5. The certified copy of the indictment may be read to the jury on the trial; and therefore, if the entire transcript, containing a copy of the indictment,

is offered to the jury, and the defendant objects to it as a whole, his objection may be overruled.

6. A verdict finding the defendant "guilty of murder in the first degree, and penitentiary for life," is sufficient to support a judgment of conviction and sentence of confinement in the penitentiary for life.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

HENRY HARRALL, the appellant, was indicted at the Fall term, 1853, of the Circuit Court of Wilcox, for the murder of one John T. Daniel,—was arrested and arraigned at the same term, and pleaded not guilty, and a day was set for his trial. On a subsequent day of the term, before the day appointed for his trial, he made affidavit for a change of venue, which was granted by the court; whereupon it was agreed that the trial should be removed to Dallas county, and it was ordered by the court "that the clerk of this court transmit, by safe and convenient mode, to the clerk of the Circuit Court of Dallas, securely sealed up, the original papers and copies of all orders and entries made in said cause, under his hand, official seal, &c.; and, also, that Thursday of the second week be set apart for the trial of this cause by consent."

At the Spring term, 1854, of the Circuit Court of Dallas, on motion of the solicitor, the prisoner being present in person, it was ordered "that a *certiorari* issue to the clerk of the Circuit Court of Wilcox, commanding him to send to this court a complete transcript of this cause, including the caption of the grand jury, a copy of the indictment, and all the orders made in said cause, under his hand and seal, by the next term of this court"; and it was further ordered, "that the clerk of said court have leave to withdraw the original indictment, and all other original papers, which he has sent to this court." At the same term, when the case was regularly called on the docket, "the defendant asked leave to withdraw his plea of not guilty, for the purpose of moving to strike the case from the docket as having been discontinued by the State, and, on failure of such motion, to demur to the indictment; which motion was continued by the court, together with the cause in which it is made."

At the Fall term, 1854, the court having granted the de-

fendant leave to withdraw his plea of not guilty, he renewed his motion to strike the case from the docket on account of the alleged discontinuance; and on the hearing of this motion, in addition to the proof of all the proceedings and orders as above set forth, "it appeared in evidence, that the Fall term, 1853, of the Dallas Circuit Court adjourned on the second day of the term, and that, at the time of said adjournment, no papers in this case, nor transcript of the proceedings, had been received from the clerk of Wilcox Circuit Court, nor was the case placed upon the docket of the Dallas Circuit Court. It was further in evidence, that the transcript from Wilcox Circuit Court was not received until the 13th February, 1854. The clerk of the Circuit Court of Wilcox was then introduced, who testified, that he did not make out the transcript until after the adjournment of Dallas Circuit Court, and his reason for not doing so was, that he had heard the court was adjourned." The court overruled the motion to strike the case from the docket, and the defendant excepted.

The defendant then demurred to the indictment, "because it was not signed by the solicitor of the circuit, but by one A. Tomlinson, sol. *pro tem.* 2d circuit"; which demurrer the court overruled, and the defendant then pleaded not guilty."

The attorney for the State offered in evidence to the jury a paper purporting to be a complete transcript of all the proceedings in the case had in the Circuit Court of Wilcox, containing a copy of the original indictment, certified under the hand and seal of the clerk of that court; to the reading of which transcript the defendant objected, but his objection was overruled by the court, and he excepted.

The jury returned a verdict finding the prisoner "guilty of murder in the first degree, and penitentiary for life"; and on this verdict the court rendered a judgment of conviction and sentence of confinement in the penitentiary for life.

The errors now assigned are, 1st, that the court erred in overruling the demurrer to the indictment; 2d, in granting a *certiorari* to the clerk of the Circuit Court of Wilcox; 3d, in not striking the case from the docket as having been discontinued; 4th, in rendering judgment on the verdict; 5th, in the several matters shown in the bill of exceptions.

GEO. W. GAYLE, with whom was B. WILLIAMSON, for appellant:

1. The indictment is defective, in not being signed by the solicitor. It is drawn under the Code, and the statute adopting the form is mandatory.—Code, § 3502; *Ex parte* Simonton, 9 Porter 390.

2. The Circuit Court of Dallas had no jurisdiction of the case; it could not try on the original indictment, and had no right to award a *certiorari* requiring the clerk of the Circuit Court of Wilcox to violate the instructions of another judge. Spencer v. Barber, 5 Hill (N. Y.) 568; 2 Sup. U. S. Dig. 248, § 10; Lynes v. The State, 3 Porter 348; Starr v. Francis, 22 Wend. 633; 4 Hill 554.

3. The prosecution had been discontinued by not sending a transcript from Wilcox to the first court in Dallas.—Kennon v. Bell, Minor's R. 98; Drinkard v. The State, 20 Ala. 9; Griffin v. Osbourne & Co., *ib.* 594; 2 Hawk. P. C. 416, § 84; *ib.* 417, § 88. The appellant was entitled to a "speedy public trial": if such delays are tolerated, a man may be kept in jail until his witnesses die, or move away.—Const. Ala. § 10. The prisoner could exercise no control over the matter, and it was not his fault.—Code, § 713. The prosecution had been discontinued, also, by striking the case from the docket of the Wilcox court under such instructions to the clerk that no other court could take jurisdiction of it.—Drinkard v. The State, *supra*.

4. No judgment could be rendered on the verdict. In criminal matters, nothing can be taken by intendment.—The State v. Seay, 3 Stew. 123.

M. A. BALDWIN, Attorney General, *contra*:

1. The indictment need not be signed by the solicitor: it derives its authenticity from the action of the grand jury.—Ward v. The State, 22 Ala. 19.

2. Although *certiorari* is a writ issuing from a superior to an inferior court, yet the authorities sustaining it, in such cases as this, from one circuit court to another, are too numerous to be now questioned: the power is grounded, principally, on the necessity of the case.—Calhoun v. The State, 4 Humph. 477; Barnes v. The State, 5 Yerg. 182; The State

v. Collins, 3 Dev. 119; The State v. Craton, 6 Ired. 166; The State v. Reid, 1 Dev. & Bat. 377; 1 Chitty's Criminal Law, p. 364; Code, §§ 3613, 3615.

3. The verdict is sufficiently certain; although not so full as it might have been, its meaning is clear.—Code, § 3080; The State v. Stephen, 15 Ala. 534; Nance v. The State, 6 Ala. 483; Noles v. The State, 24 Ala. 694; Poindexter v. Commonwealth, 6 Rand. 667; Pitts v. Bingham, 10 N. H. 519; Schlenker v. Risley, 3 Scam. 483; Bank v. Batty, 4 *ib.* 2; Porter v. Rummery, 10 Mass. 64; State v. Yancey, 3 Brev. 144; 1 Bay 243; Hawks v. Crofton, 2 Burr. 698; Nabors v. The State, 6 Ala. 201; 1 Chitty's Crim. Law, p. 644.

RICE, J.—Section 3613 of the Code provides, that, "when an order removing the trial in a criminal case is made, *the clerk must* make out a transcript of the caption of the grand jury, the indictment, with the endorsement thereon, and all entries relating thereto, the undertakings or recognizances of the defendant, and all the orders and judgments upon the same, the order for the removal of the trial, and all the other orders in the cause,—attach his certificate thereto, and forward it, sealed up, by a special messenger, or deliver such transcript and certificate to the clerk of the court of the county to which the trial is ordered to be removed."

The clerk is a mere ministerial officer, and his duty as such, in the cases provided for by the section of the Code above quoted, is clearly prescribed by that section. No court can relieve him from the performance of that duty, thus prescribed by statute. The rules and practice of the court, established by the court itself, may sometimes be made to yield to circumstances, to promote the ends of justice." Not so as to a statute; it is unbending, requiring implicit obedience, as well from the court" as from its suitors and its clerk. The court possesses no dispensing power as to a statute.—Jackson v. Wiseburn, 5 Wend. R. 136; Caldwell v. Mayor, 9 Paige's R. 572.

It follows from what we have above said, that the prisoner can obtain no benefit here from the fact, that in the order for the removal of the trial, the court directed the clerk to trans-

mit "*the original papers*, and copies of all orders and entries made in said cause"; for, notwithstanding that direction, it still remained the duty of the clerk to transmit such a transcript as is required by section 3613 of the Code.

Whether the order of the Circuit Court of *Wilcox*, directing its clerk to transmit "*the original papers*, and copies of all orders and entries made in said cause", is proper or improper, so far as it relates to "the original papers", we need not decide; for, conceding it to be improper to that extent, it certainly furnishes no ground for the reversal of the judgment of the Circuit Court of *Dallas*. It could not, and did not, disable the clerk of the Circuit Court of Wilcox from performing the duty prescribed to him by section 3613 of the Code: that clerk might have sent such a transcript as was required by that section, *and also* "*the original papers*."

It is evident, that there has been no discontinuance of this case, unless the omission of the clerk of the Circuit Court of Wilcox to perform the duty required of him by section 3613 of the Code, for two terms after the order was made for the removal of the trial, produces a discontinuance, under the circumstances shown in this record.

After examining all the provisions of the Code upon the subject of removing a trial in a criminal case, and many authorities upon the subject of discontinuances, our opinion is, that such omission of the clerk does not work a discontinuance, and that there has been no discontinuance in this case. —Wiswall v. Gliddon, 4 Ala. R. 357; Calhoun v. The State, 4 Humph. R. 477; The State v. Collins, 3 Dev. R. 119; Drinkard v. The State, 20 Ala. R. 9.

In Drinkard v. The State, 20 Ala. R. 9, the defendant had *never* been arrested; the cause was taken from the docket *by the solicitor, with the permission of the court*, and no process issued thereon for more than two years. This court correctly held, that the cause was thereby discontinued. But in that case, the court admitted, that the defendant could not be allowed to take advantage of the omissions of the clerk, a mere ministerial officer, to perform his duty. It was *the active interference* of the prosecuting attorney with the cause, by the permission of the court, in the manner above stated, which worked the discontinuance. Neither that case, nor any other

known to us, gives any countenance to the proposition for which the prisoner contends in this case, to-wit, that the failure to docket the case at the Fall term, 1853, of the Circuit Court of Dallas, and the failure to furnish the clerk of that court with any transcript until after that term, and the failure to get a proper transcript to that court until the Fall term, 1854, amount to a discontinuance. This proposition is nothing more than the assertion, that the mere neglect of ministerial duty by a ministerial officer, works a discontinuance of a prosecution. We do not understand this assertion to be any part of the law of this State.

As the court to which the trial of a criminal case is removed, is authorized by section 3615 of the Code to direct the clerk of the court from which it was removed "to certify any portion of the record which he has omitted, or to rectify the same", we think a *certiorari* is a proper mode of directing and requiring the clerk to certify any and every part of the record which he has omitted; and when "the original papers" have been sent to the court to which the trial is removed, that court may restore them to the clerk of the court in which the indictment was found.

In Ward v. The State, 22 Ala. R. 17, it was correctly decided, that it was not necessary that the name of the solicitor should be signed to an indictment. The absence of his name is the only objection made to the indictment in this case; we hold the indictment to be good.

When the trial of a criminal case is removed from one circuit court to another, section 3615 of the Code requires the defendant to be tried on "the copy of the indictment", certified as directed in section 3613. It could not, therefore, possibly be erroneous to read to the jury "the copy of the indictment" so certified.—The State v. Matthews, 9 Porter's R. 370, and cases therein cited; Lanier v. Br. Bank, 18 Ala. R. 625. The transcript offered to the jury in this case was thus duly certified, and contained a copy of the indictment. The objection of the prisoner was general, and was made to the transcript as *a whole*. As *part* of it was clearly legal, to-wit, the copy of the indictment, there was no error in overruling the objections as made.—Hrabowski v. Herbert, 4 Ala. R. 265; Troutman v. Melton, 15 Ala. R. 535.

The verdict is sufficient to authorize the judgment of conviction and sentence of confinement in the penitentiary for life.—Noles v. The State, 24 Ala. R. 672, and other cases cited on the brief of the Attorney General.

There is no error in the record, and the judgment of the Circuit Court of Dallas is affirmed, and the sentence pronounced by it must be executed.

CHAMBERS *vs.* THE STATE.

1. If a part of a conversation is adduced in evidence by the State, as proving the defendant's declarations or confessions of guilt, he has the right to call for the whole of what was said in that conversation relative to the subject-matter in issue.
2. Under an indictment against a negro trader for exhibiting slaves for sale without a license, (Pamph. Acts 1849-50, p. 8,) after evidence has been offered of a particular act of sale within the time covered by the indictment, evidence of a previous act more than twelve months before the finding of the indictment is admissible for the State, as tending to show that the defendant was engaged in the business of negro-trading.
3. If the defendant was engaged in the business of negro-trading, proof of one act, in pursuance of such business, within the county in which the indictment was found, is sufficient to support a conviction.

APPEAL from the Circuit Court of Perry.
Tried before the Hon. ANDREW B. MOORE.

THE indictment in this case, which was found at the Fall term, 1852, charged "that John Chambers, late of said county of Perry, on the first day of October, A. D. 1852, at, to-wit, in said county, did unlawfully then and there fail to procure license therefor, and did then and there engage in the business of negro-trading without such license, and did then and there unlawfully exhibit for sale divers, to-wit, twenty negro slaves, contrary to the form of the statute," &c. On the trial, "the State introduced and examined a witness, who testified, in substance, that in the month of July, 1852, the defendant had in his possession, at Woodville in said county, four slaves, and then and there told witness that they were for sale, and

offered to sell them to him; that he (witness) then and there bargained with defendant for two of them, and by agreement between him and defendant the latter was to deliver said slaves to witness at his house in Marengo county, and then witness was to execute his note to defendant for the purchase money; that defendant, on the evening of the same day, carried said slaves to the house of witness in Marengo county, and remained there all night; and that on the next day witness then and there executed his note to defendant for the purchase money, and defendant executed to witness a bill of sale for said slaves. The defendant then offered to prove by said witness, on his cross-examination, that at the very same time, and in the same conversation, when defendant told witness that the slaves were for sale, and offered them for sale, and when witness bargained for them as aforesaid, he (defendant) told witness that he was not engaged in the business of negro-trading; which testimony was rejected by the court, and defendant excepted. Defendant then offered to prove that he further said to the witness, in the same conversation, that he lived in Tuskaloosa, and was then (and had been for some years) engaged in keeping a store in that town; that he had owned these negroes for about four years, and had kept one of them about his store in Tuskaloosa; all which evidence, on motion of the solicitor, was rejected by the court, and thereupon defendant excepted.

"The State also introduced witnesses, who testified, against the defendant's objection, that in March, 1851, defendant was in and near Woodville in said county, in possession of some ten or twelve negroes, and then and there offered them for sale, and did sell two of them; but the objection was overruled by the court, and the defendant excepted.

"The foregoing was, in substance, all the material testimony in the case; and thereupon the defendant asked the court to charge the jury, that, before they would be authorized to convict the defendant, the facts and circumstances should be so convincing, as to lead their minds to the conclusion that the accused cannot be innocent of having engaged in the business of negro-trading, in Perry county, within twelve months previous to the finding of the indictment. This charge the court refused to give, but charged the jury,

that if the defendant was engaged in the business of negro-trading, within the State of Alabama, and either sold, or offered for sale, any negroes in the county of Perry, in the month of July, 1852, they must find him guilty; that they might look to the proof showing that he offered for sale and sold negroes in said county in March, 1851, as a circumstance tending to show that he was engaged in the business of negro-trading in July, 1852, but that they would not be authorized from that circumstance alone to find him guilty." To the refusal to charge as requested, and to the charge given, the defendant excepted.

No errors are assigned on the record.

WM. M. BROOKS, for the appellant:

1. The court erred in rejecting the declarations of Chambers: they were a part of the same conversation already brought out by the State; they appertain to the same subject-matter, were material, and therefore admissible.—Nelson v. Iverson, 24 Ala. 9; 1 Green. Ev., pp. 233, 252, 253.

2. These declarations were made at the time Chambers had the negroes in possession, and offered them for sale; they accompanied the act, and were a part of the *res gestæ*, and therefore admissible.—Pitts v. Borroughs, 6 Ala. 733; 1 Green. Ev. 108, 109.

3. The court erred in permitting the State to prove that the defendant had negroes in possession and offered to sell them in March, 1851. This evidence did not legitimately tend to show the character of his business in July, 1852, when he offered the other negroes for sale. It was not a part of, or in any manner connected with, the act for which the defendant was indicted.

4. The court erred in refusing to give the charge asked.—The defendant was not guilty, unless he had been engaged in the business of negro-trading in the county of Perry, and, while so engaged, sold, or offered for sale, negroes in said county.—Pamph. Acts 1849, p. 8. The charge in the indictment is, that "he did then and there engage in the business of negro-trading without a license," &c., "and did then and there sell, or offer to sell," &c. The effect of the charge asked was, to require the State to prove the allegations of the

indictment. The jury should not have found the defendant guilty, unless the facts and circumstances were so convincing as to lead their minds to the conclusion that the accused cannot be innocent.—State v. Murphy, 6 Ala. 846; 3 Green. Ev. 29, 30.

5. The charge given is erroneous, not only for the reasons above stated, but because it required the jury to convict the defendant if they believed he was then engaged, or had at *any time* been engaged, in the business of negro-trading, *any where in the State of Alabama*, and had either sold, or offered to sell, negroes in the county of Perry in the month of July, 1852. The defendant could not be convicted, unless he offered negroes for sale at the same time when he was engaged in the business of negro-trading; and neither was he guilty unless he had been engaged in the business of negro-trading within the county of Perry within twelve months before indictment found. The evidence did not authorize a conviction. This charge is also erroneous, in stating that the fact of the defendant's having in possession and selling negroes in 1851, tended to prove that he was engaged in the business of negro-trading in July, 1852. This evidence did not legitimately tend to prove any such thing; but, at all events, it was the exclusive province of the jury to determine what the evidence proved, or tended to prove.

M. A. Baldwin, Attorney General, *contra:*

1. Declarations of a defendant, in a criminal case, although cotemporaneous with the crime alleged, cannot be given in evidence by him on the trial, unless they form part of the *res gestæ*, or are given in evidence against him.—1 Bail. 332; Stark. (Part I) 49; Commonwealth v. Hide, Thacker's Crim. Cases, 19; Commonwealth v. Kent, 6 Metc. 221; Scaggs v. State, 8 S. & M. 722.

2. It was proper for the State to prove that in March, 1851, defendant was in the possession of slaves in the county of Perry, which he offered for sale and did sell, as a circumstance which might be taken into consideration to show whether or not defendant was engaged in the business of negro-trading.—1 Ald. & El. 733; 1 Green. Ev. § 110; Commonwealth v. Hopkins, 2 Dana 418; Lawson & Swinney v. The State, 20 Ala. 65.

3. The charge asked was properly refused, in connection with the charge given. It takes a series of acts to make up an employment or engaging in a particular business; and many acts, committed outside of the county, may be given in evidence, to show the character of the act in the particular county.—2 Dana 419, *supra*.

CHILTON, C. J.—The State having proved, by an examination in chief, that the defendant, in July, 1852, having possession of four slaves in the county of Perry, told the witness they were for sale, and offered to sell them to him, and that thereupon a bargain was struck for two of them, which the defendant delivered to said witness in Marengo county,—the defendant offered to prove by the same witness, upon his cross-examination, that the defendant said, in the same conversation, and at the same time he told the witness that the slaves were for sale, that he (the defendant) was not engaged in the business of negro-trading. This proof the court excluded, and the first question presented is, whether the court properly rejected it.

The proof that the defendant told the witness he had the four negroes for sale, was offered by the State as declarations, or confessions, tending to establish his guilt; and the general rule is, that the whole of what the prisoner said on the subject, at the time of making the confession, should be taken together. "This rule," says Professor Greenleaf, "is the dictate of reason, as well as humanity." "If," says he, "one part of a conversation is relied on, as proof of a confession of the crime, the prisoner has a right to lay before the court the whole of what was said in that conversation, not being confined to so much only as is explanatory of the part already proved against him, but being permitted to give evidence of all that was said upon that occasion relative to the subject-matter in issue."—1 Green. Ev. § 218, and authorities cited in notes. Of course, it is for the jury to say what weight shall be given to the confession:—they may believe that part which charges the prisoner, and reject that which tends to exculpate him, if they see sufficient grounds for so doing.—Rex v. Higgins, 3 C. & P. 603; Rex v. Steptoe, 4 *ib.* 397; Respublica v. McCarty, 2 Dall. 86; Bower v. The State, 5 Miss. 364.

2. There was no error in allowing the State to prove that the defendant had slaves and offered to sell them in March, 1851, as shown by the bill of exceptions. This was a circumstance tending to show that he was engaged in the business of negro-trading, and is fully warranted by the decision of the court in the 2d of Dana, 418; see, also, Lawson v. The State, 20 Ala. 65.

Under the provisions of the act of 1849-50, (Pamph. Acts, pp. 8—11,) any negro trader, broker, or agent, could obtain a license from the clerk of any county court, for the sale or exhibition for sale of slaves in any part of the State, upon paying ten dollars for each slave to be sold or exhibited; but if such trader, broker, or agent engage in such business without obtaining a license as aforesaid, the fifth section of the act above referred to subjects him to an indictment, to be fined any sum the jury may assess.

A slave merchant or trader may engage in this business without being located in any particular county. He is often migratory with his slaves, and according to the construction of this act contended for by the counsel for the accused, he might make one sale at least in each county in the State without license, without infringing the law. Such is not our understanding of the meaning of the Legislature. On the other hand, we are of opinion, that if he follows this business anywhere in the State without license, he may be indicted and tried in any county in which he sells or exhibits his slaves for sale, in pursuance of such business. If trading in slaves be his business, he is following that business when he makes a sale of them in pursuance of such business; and it makes no difference, if the jury are satisfied that he follows the business anywhere in the State at the time of the act complained of, whether he made one or a number of sales in pursuance of it in the county in which he is indicted.

What we have said will be sufficient to guide the future progress of the cause.

Let the judgment be reversed, and the cause remanded.

BRYAN *vs.* THE STATE.

1. The object of a demurrer to evidence is, not to substitute the judge for the jury as a trier of the facts, but to ascertain the law upon an admitted state of facts; and its effect, when issue is joined, is to admit every fact which the testimony tends to establish.
2. Under an indictment for gaming, (Code, § 3243,) upon demurrer to the evidence, the defendant may be convicted on proof of his having played a game of "ramps" in a store-house where spirituous liquors were at the time retailed.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. GEO. D. SHORTRIDGE.

JESSE W. BRYAN, the appellant, was indicted at the Fall term, 1854, of the Circuit Court of Pickens, for gaming; the indictment charging, in the alternative, all the offences enumerated in section 3243 of the Code. On the trial, the defendant, having introduced no evidence himself, demurred to the evidence adduced in behalf of the State; and the State having joined in the demurrer, the court held the evidence sufficient to support a conviction, and judgment was rendered accordingly. The evidence, as set out in the record, was as follows:

"The defendant, within twelve months before the finding of the indictment, played at a game called "ramps," in a store-house where spirituous liquors were at the time retailed, in the county of Pickens. The game was played with a set of dominoes, consisting of twenty-eight pieces; the dominoes are pieces of bone, numbered from one to six, besides one suit being blank; there are seven suits,—blank, aces, deuces, &c.; and each suit is subdivided,—as, ace blank, ace deuce, &c. The game is played by turning the numbered sides of the pieces flat on the table; the players then turn over one each, and the player turning over the one which has the highest number of spots upon it wins the trump; the faces of these pieces are then turned down again, and all the pieces are then shuffled; each player then draws five pieces, and one of them turns over another piece as a trump for the player who won the trump; the player who won the trump may then discard

one of the five pieces he drew, and take the trump in lieu of it, or he may discard the trump and his hand besides, draw six more pieces, and discard one; any other player may discard the five pieces he drew, and draw six more and discard one. In playing, each player must follow suit, if he can; and if he cannot, he may trump. Any player who fails to take a trick is "ramped." In making the game, the players fix upon a number (usually fifteen) for each. If only two are playing, the party who does not take a trick is "ramped," by which five is added to the fifteen, and five taken from the fifteen of the other player; and so on, until one player or the other gets out—that is, reduces the fifteen with which he started to nothing. The stake is a treat, or cigars, from the party who is "ramped." No money was bet by the defendant; but the game is a mixed game of skill and chance, and money may be won and lost at it. There is no game played with dice similar to the game of "ramps." In "ramps," the trump is played out by the person who won it; but the winner of the trump is neither obliged to play the five pieces he drew, nor draw more: he may throw up his hand altogether, and let the other players go on; if he does so, he cannot be "ramped" on that hand. The only games of cards in which the trump is played out, are eucre and whist.

"The State then introduced another witness, who testified, that a game usually played with cards could be played with dominoes; that he had, at the instance of the court and counsel, on this forenoon, in the presence of the jury who tried a similar case to the one at bar, played said game, called "thirteen-and-the-odd," both with cards and with dominoes, with a like result, and on the same principle. He further testified, that the game of "ramps" could be played with cards, by taking the twenty-eight cards from ace to seven inclusive of each suit; and, at the instance of the court and counsel, played with another the said game of "ramps," first with cards, and then with dominoes, in the presence of the jury; and witness testified, that the mode of procedure, and the result obtained, were the same in each instance; further, that he had never known or heard of a game of cards called "ramps," nor a game played with dominoes called "thirteen-and-the-odd," except the two games played as above stated for the purpose of illus-

tration; that if there had been such games, he thought he would have known or heard of them; that in playing "ramps" with dominoes for a treat, the game was not ended until each player but one had made his points, and the last one out paid the treat; but in playing said game for money, when one player had made his points, he took all the stakes, and the game ended; and that he had often seen the game played for money; by 'points' the witness means the score of fifteen, or other number determined on by the players, the winning of which was necessary to make any player win the game, as far as his hand was concerned."

This being all the evidence, the court held it sufficient to convict the defendant, and therefore overruled the demurrer.

No errors are assigned on the record.

T. Reavis and S. F. Hale, for the appellant.

M. A. Baldwin, Attorney General, *contra*.

GOLDTHWAITE, J.—The only question presented by the record arises upon the action of the court on the demurrer to the evidence. The object of a demurrer to evidence is not, as has sometimes been supposed, to substitute the judge in the place of the jury as a trier of the facts; for, if that was the case, it would destroy one of the chief characteristics of the common law, which separated, by a clear and distinct line, the duties of the judge and jury,—giving to the one the determination of the facts, and confining the other to questions of law. The office of a demurrer to evidence is precisely the same as a demurrer to the pleading: each is intended for the purpose of ascertaining the law upon a particular state of the facts, but the proceedings are necessarily different. In the one case, the facts are alleged in writing in the pleading; in the other, the evidence is submitted to the jury, and if it does not tend to establish the issue, the objection goes to its admissibility. If admissible, the jury are the sole judges of the weight to be given it, and they, and they alone, are to determine how far it conduces to the proof of the facts. If the defendant believes that the facts which the evidence conduces to prove would not be sufficient to maintain the action in a civil case, or make out the offence in a criminal prosecution,

he may call upon the court to declare the law upon the facts, and this he does by a demurrer to the evidence. If, however, the evidence is loose, uncertain, contradictory, or circumstantial, he cannot call upon the court to draw the inferences, or to determine how far it goes to establish the fact: these are matters for the jury. If he wishes, therefore, in a case of that kind, to submit the law to the court, he must admit every fact which the testimony tends to prove, and this is the effect of the demurrer if issue is joined. This is the whole theory of the demurrer to evidence, and hence we held in Young v. Foster, 7 Porter 420, that the court does not in that proceeding stand in the place of a jury to render such judgment as the jury ought to have done, but to render such judgment as the jury from the evidence could have rendered; and this principle is re-affirmed in Carson v. The Bank, 4 Ala. 148; see, also, Duerhagen v. United States Insurance Co., 2 S. & R. 185; Maus v. Montgomery, 11 *ib.* 329.

Applying this principle to the case before us, there is no difficulty. The record shows that every ingredient in the offence charged was clearly established, except the fact as to whether the game was played with a substitute or device for cards; and under the rule we have adverted to, if there was any evidence tending to prove that fact, on demurrer we are bound to consider the fact established. The record discloses, that the game, although played with dominoes, could as well be played with cards,—that the dominoes are shuffled, a trump is made, and the players must follow suit if they can, and if not, are allowed to trump,—tricks are taken, and points made. Here, then, we have a game which can be played with cards, and is played on the same principles which govern some games in cards, and in which the same cant phrases and terms are made use of. We cannot say with positive certainty, upon this evidence, that the dominoes were used by the appellant as a device or substitute for cards, but we are very clear that the evidence we have stated tends to establish that fact, and there was for that reason no error in the judgment of the court.

Judgment affirmed.

WINDHAM ET AL. *vs.* THE STATE.

1. The term "*public place*," as used in the statute against gaming, (Code, § 3243,) does not include any of the places therein before specifically mentioned, but embraces all other public places, whether they are public *per se*, or become public merely by force of circumstances; and therefore, if the evidence shows that the defendants played cards at a "*public house*," they cannot be convicted of playing at a "*public place*."
2. A room in a warehouse for storing cotton on the bank of a navigable river, which is used by the clerk both for the transaction of business and as a sleeping room, is a "*public house*" within the statute against gaming, but not a "*public place*."
3. The same distinction is applicable to the cases of Burdine v. The State (25 Ala. 60), Sherrod v. The State (*ib.* 78), Roquemore v. The State (19 *ib.* 528), and Clarke v. The State (12 *ib.* 492).
4. When the gaming is at a "public house," or at any one of the other places specifically enumerated in the statute, no matter what secrecy may be used, nor how few the number present, it is a violation of the statute.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. GEO. D. SHORTRIDGE.

THE appellants were indicted (under section 3243 of the Code) for gaming. On the trial, as appears from the bill of exceptions, "it was proved that the defendants played at a game with cards in a room of a house used for storing goods, &c., on the bank of a navigable river in the county, and about one hundred yards from the cotton sheds where cotton to be shipped was stored; that the occupant of said room was the clerk of the warehouse, and made out and distributed cotton receipts in said room; that it was the office of the concern, where business with steamboats was settled; that the playing was in the day-time, with the front door locked, and the windows closed, so that the parties playing could not be seen from the outside; that the back door, which opened into an alley, was closed and locked, except when the occupant passed in and out, at his option, to deliver cotton receipts to negroes hauling cotton to the sheds; that no person, except those playing, visited the room during the time, and that the door of the adjoining store-room was locked; that the parties playing were there by invitation of the occupant of said room, but

he did not play; that he occasionally, about that time, invited persons there to play cards, and they did play; that he sometimes let one Dr. Windham have the key of said room, with permission to play there, and they did play. The witness stated, however, that these defendants were planters, living in the county, and that this was the only game they ever played there; further, that the river, at the time of the playing above-mentioned, was too low for the boats to run, and that all gaming ceased there so soon as the river opened and the boats commenced running.

"Upon this evidence, at the request of the solicitor, the court charged the jury, that if they believed the occupant of the said room was in the habit of inviting his friends there to play cards, and they did play, and others came to him for permission to play cards, which he never refused, and these likewise played, then the place was a public place"; to which charge the defendants excepted, and which they now assign for error.

S. F. HALE, for the appellants.

M. A. BALDWIN, Attorney General, *contra*.

RICE, J.—Section 3243 of the Code is a substantial transcript of the law against gaming which had been of force at least from 1842 until the Code took effect. That section is in the following words: "If any person plays at any game with cards, or dice, or with any device or substitute for the same, at any tavern, inn, store-house for retailing spirituous liquor, or house or place where spirituous liquor is retailed or given away; or *any public house*, or *highway*, or in *any other public place*; or in any out-house where people resort, such person, on conviction, must be fined not less than twenty or more than fifty dollars."

The words "public place," as used in this section, do not mean or include any of the places therein before *specifically mentioned*,—that is, "tavern, inn, store-house for retailing spirituous liquor, or house or place where spirituous liquor is retailed or given way; or any public house, or highway"—however public any of these *specified places* may be. But the words "public place," as therein used, do mean and include

all "*other*" places which are public, whether they are public *per se*, or become public merely by force of circumstances.—"Public house" in this statute is a specific term, and is followed by a term of more comprehensive meaning—that is, "any *other public place*." And therefore, upon a well established principle, it has been decided, that although a person may be guilty of playing cards at a "highway," ("or public house,") such person cannot lawfully be convicted for playing cards at a "public place."—Bush v. The State, 18 Ala. 415.

In Johnson v. The State, 19 Ala. 527, it was decided, that a room in the second story of a two-story house, which was accessible only by means of a flight of steps leading up to it on the outside, and which was used by one of the proprietors of the house as a sleeping apartment, (the lower room being used by the proprietors for retailing spirituous liquor,) was within the prohibition of the statute against gaming at a "store-house for retailing spirituous liquor, or house or place where spirituous liquor is retailed or given away." Believing this decision to be correct, we are under its influence impelled to the conclusion, that if the evidence set forth in the bill of exceptions in the present case be true, the room in which the plaintiffs in error played was, at the time of the playing, a "*public house*", within the meaning of the statute.

In Clark v. The State, 12 Ala. 492, Chief Justice Collier (a majority of the court concurring with him) held, that if a lawyer, or a physician, "invites a few friends to his office, either in the day-time or night, and closes the door so as to exclude all others, that he may spend a social hour at cards or dice with these friends, it ceases to be a *public place*, within the meaning of the statute." The principle of that decision was followed in Roquemore v. The State, 19 Ala. 528, in Burdine v. The State, 25 Ala. 60, and in Sherrod v. The State, 25 Ala. 78. We do not now feel at liberty to overrule those cases. The charge of the court below is opposed to those decisions, and is not sustained by Campbell v. The State, 17 Ala. 369, which held a shoe-maker's shop a "public place," mainly on the ground that *many* passed into and out of it during the playing; which case we here re-affirm. Nor is it sustained by the case of Mills v. The State, 20 Ala. 86.

But it must be noticed, that in Clark v. The State, *supra*,

Chief Justice Collier conceded, that the office of the lawyer or physician was a "*public house,*" which was not denied by any of the judges in that case, and which is not denied or questioned in Burdine v. The State, or Sherrod v. The State, aboved cited.

When the playing is in a public house, or in any of the other places specifically enumerated in the statute, no matter what secrecy there may be in the playing, nor how few the friends who may be spending their "social hour at cards or dice," they are violators of the statute, and incur its penalty. Bythwood v. The State, 20 Ala. 47.

If the court below had charged the jury, that if they believed all the evidence set forth in the bill of exceptions, the room in question was a "public house", we should have sustained the charge. But in charging that the room was a "public place", the court below erred; and therefore we reverse its judgment, and remand the cause.

MARTHA (A SLAVE) *vs.* THE STATE.

1. In an indictment for arson under the Code, as at common law, the ownership of the house burned must be alleged, and must be proved as laid.
2. If the proof of the ownership varies from the allegation, and a *nolle pros.* is thereupon entered, this is no bar to a subsequent prosecution under a second indictment, in which the ownership is alleged to be in a different person; and if the second indictment contains several counts, in one of which the allegation of ownership is the same as in the first indictment, and the defendant pleads to the whole indictment *autrefois acquit* and discontinuance, the record of the former prosecution does not sustain either plea.
3. It is the duty of the court to declare the legal effect of a record which is offered to sustain the plea of *autrefois acquit* or discontinuance, and the record itself cannot be gainsayed by parol evidence; therefore, the court may charge the jury that the pleas are not sustained by the proof, when that is the fact.

ERROR to the Circuit Court of Dallas.
Tried before the Hon. NAT. COOK.

The plaintiff in error was indicted, at the Fall term, 1854,

for arson. The indictment contained four counts, of which the first alleged the house burned to be "a dwelling-house of James E. Todd"; the second, "a dwelling-house, the property of James E. Todd, occupied as a dwelling-house at the time aforesaid, to-wit, before the finding of this indictment, by Allen W. Coleman"; the third, "a dwelling-house, the property of James E. Todd, and occupied at said time by Allen W. Coleman"; and the fourth, "a dwelling-house of Allen W. Coleman." The prisoner pleaded, in short by consent, 1st, not guilty; 2d, *autrefois acquit*, and 3d, that the prosecution was discontinued by the State, at the last term of the Circuit Court of said county, by dismissing the same.

On the trial, the prisoner proved, to sustain her pleas, that at the last Spring term of the court she had been put upon her trial on an indictment, found against her at that term of the court, for burning "a dwelling-house of Allen W. Coleman"; "that she pleaded not guilty to that indictment, and a jury was thereupon elected, empanneled, and sworn to try said indictment; that all the witnesses in said cause were examined, and the solicitor for the State, then finding that the proof showed the house burned, which was alleged in the indictment to be the property of Allen W. Coleman, belonged to one James E. Todd, dismissed the prosecution, against the consent of the defendant, and obtained leave of the court to file another indictment; and that the jury was then discharged, without defendant's consent. The defendant further proved, by all the witnesses of the State, that the arson charged in the present indictment was the same identical arson about which they were examined at the said Spring term of the court; that the house set on fire was the same about which they were then and now examined, and the burning and attempt to burn the same." The order of dismissal rendered at the previous term, which is copied into the bill of exceptions, after stating the variance between the allegation and proof of ownership, proceeds thus: "The prisoner refused to allow an amendment, so as to make the allegation correspond with the proof; and thereupon the solicitor dismissed this prosecution, and moved the court to re-commit the prisoner, to answer a new indictment; which motion is granted, and the prisoner re-committed as aforesaid."

"The foregoing being all the evidence before the jury, the court charged them, that the pleas of *autrefois acquit* and discontinuance were not sustained by the proof; to which charge the defendant excepted", and which she now assigns for error.

GEO. W. GAYLE and WM. M. MURPHY, for plaintiff in error.
M. A. BALDWIN, Attorney General, *contra*.

CHILTON, C. J.—The counsel for the prisoner is mistaken, in supposing that the Code does not require the ownership of the house alleged to have been burned to be averred in indictments for arson.—See forms Nos. 52 and 53, pp. 704-5. The Code makes no change upon the common law in this respect. East (in his Crown Law, p. 1034) says, "It is plain an indictment for arson must, upon the face of it, appear to be of the house of another, and it must also state whose house, and with that the proof must agree."

In this case, it appears the proof did not agree, upon the trial of the first indictment, with the averment of ownership, and the defendant failing to consent to an amendment (as provided for by the Code, §§ 3529-30-31), a *nolle pros.* was entered, and a new indictment was preferred and found by the grand jury, in which the ownership of the house was averred to be in another and different person from the one charged to be the owner in the first indictment. This appears to conform substantially to the provisions of the Code above referred to.

If, however, the withdrawal of the cause from the jury, upon the trial of the first indictment, could be regarded as a discontinuance of that prosecution, or was equivalent to an acquittal of the offence there charged, it is perfectly clear, that a discontinuance of a prosecution for wilfully and maliciously burning the house of Allen W. Coleman, or an acquittal upon an indictment for such offence, would be no bar to a subsequent prosecution upon an indictment for arson in burning the house of James E. Todd. We have seen, that the indictment must aver whose house it was, and that no conviction can be had unless the proof sustains this averment. 2 East's Crown Law 1034. Why is this? The reason is obvious: the record of the conviction would otherwise furnish

no bar to a subsequent indictment charging the arson to be of a dwelling-house the property of another person than the one named in the first indictment as the proprietor of the house. In other words, it would be to charge the prisoner with burning one house, and to find her guilty of burning another.

As, therefore, the offences charged in the two indictments are distinct and different, the record showing the discontinuance of, or acquittal upon the prosecution of the one, would be no bar to a prosecution for the other.

It may be said, however, that one count in the last indictment is for burning the dwelling-house of Coleman, and that this count agrees with the first indictment. So it does; but the pleas go to all the counts, and not merely to this one. The prisoner's counsel insisted upon the former record as a complete bar to the several counts, one of which charges the house to be the property of James E. Todd; another charges the burning of a dwelling-house of James E. Todd, occupied at the time by Allen W. Coleman.

As the record showed the two indictments to be for different offences, and as a record cannot be gainsayed by parol evidence, it was entirely proper for the court to charge the jury that the pleas of *autrefois acquit* and discontinuance were not sustained by the proof. This was no invasion by the court of the province of the jury; for it was the duty of the court to declare the legal effect of the record insisted upon by the prisoner as sustaining her pleas. As a matter of law arising upon the effect of the record, the pleas remained wholly unsustained.

We do not entertain a doubt as to the correctness of the ruling of the primary court. Its judgment is consequently affirmed, and the sentence of death, pronounced by said court upon the prisoner, must be carried into execution.

RODGERS *vs.* THE STATE.

1. Under an indictment for betting "at a game of pool at a public place enumerated in section 3243 of the Code," the defendant may be convicted on proof that he played pool at a table regularly licensed for billiards; as a license to keep a billiard table does not authorize its use for the game of pool.
2. An indictment for betting "at a game of pool at a house where spirituous liquors were retailed," or (as alleged in a second count) "at a public place enumerated in section 3243 of the Code," conforms substantially to the requisitions of the Code, and is therefore sufficient.

ERROR from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THE indictment in this case, found at the Fall term, 1854, is as follows:

"The grand jury of said county charge, that before the finding of this indictment, Alsey F. Rodgers did bet at a game of pool at a house where spirituous liquors were retailed; and the grand jury of said county further charge, that Alsey F. Rodgers did bet at a game of pool at a public place enumerated in section 3243 of the Code, against the peace and dignity of the State of Alabama."

The defendant demurred to the indictment; but his demurrer was overruled, and he excepted. On the trial, "it was proved that the table on which defendant played and bet had been, and was at the time of betting, regularly licensed as a billiard table, and was then and there kept and exhibited for playing billards and pool; that the game of pool was played on a table in all respects like a billiard table, except that it sometimes had no pockets; that the players each put in a certain sum, and that the first one who, by skill or chance, made thirty-one points, neither more nor less, entitled himself to the stake, deducting five cents for each player which went to the exhibitor; that the game was played, indiscriminately, upon tables with and without pockets, which are sometimes called pool tables, and sometimes billiard tables; that the game of pool is one of the varieties of the game of billiards, played on billiard tables with pockets (called "old pool") or without pockets (called "Spanish pool"), with the ordinary billiard

tables, cues, and balls. The court charged the jury, that the defendant would be liable to conviction for betting at the game of pool played on a regularly licensed billiard table; to which charge the defendant excepted."

These two rulings of the court are now assigned for error.

WM. M. MURPHY, with whom was C. C. PEGUES, for plaintiff in error.

M. A. BALDWIN, Attorney General, *contra*.

GOLDTHWAITE, J.—In the present case, it is only necessary to consider whether by the laws in force previous to the act of 17 February, 1854, (Acts 1853–54, p. 30,) a license to keep a billiard table conferred upon the party obtaining it the right to use the table for the game of pool; for, if he did not acquire such a right, it is obvious that the statute referred to, which makes the betting at pool at certain places an indictable offence, did not impair the obligations growing out of his license to keep a billiard table. With reference to a correct decision of this question, it is necessary to determine whether the fourth clause of section 397 of the Code uses the term "billiard table" merely as the synonym of "pool" table, which is found in the same clause; for, if the Code makes a distinction between the two tables, and requires a license to be taken out for each, it is in effect drawing a distinction between the games of pool and billiards, it being obvious that in such case the Legislature could never have intended that a license to keep one table should in effect confer the right of keeping both. Looking to the words of the clause to which we have referred, we think it clear that the distinction we have adverted to was intended to be drawn, for otherwise the use of the word "pool" would be entirely superfluous. We find that the act of 6th of March, 1848, (Acts 1847–48, p. 32,) expressly recognized this distinction. The words are, "for keeping a billiard table, fifty dollars; for keeping a pool table, fifty dollars": and the subsequent acts, although there is a slight change of language, evidently mean the same; and although one might, by taking out the two licenses, acquire the right to keep the same table for both pool and billiards, he could not obtain this privilege without doing so. It follows

that as the betting in this case was at pool, upon a billiard table, it fell within the provisions of the act of 1854, unless it was shown that the table was licensed for pool as well as billiards—which the record does not show.

In relation to the demurrer to the indictment, it is only necessary to say, that it conforms substantially to the requisitions of the Code, and is therefore sufficient.

Judgment affirmed.

ELLIOTT *vs.* THE STATE.

1. An indictment which, upon its face, charges several defendants for several offences committed by them independently of each other, (some of which were committed by some of the defendants at one time, and some by others of the defendants at a different time,) is fatally defective.
2. If an indictment is unobjectionable on its face, no conviction under it can be had on proof of facts which, if stated in the indictment, would make it fatally defective, and enable the defendants, after conviction, to arrest or reverse the judgment.
3. Therefore, if A and B are jointly indicted and tried for gaming, and the evidence shows that A and others played at one time when B was not present, and that B and others played at another time when A was not present, no conviction can be had against them.

APPEAL from the Circuit Court of Limestone.
Tried before the Hon. JOHN E. MOORE.

INDICTMENT for gaming against Colley C. Elliott, David Elliott, Thomas Owen, and Gaines Smith, of whom the first two only were taken, and tried jointly on the plea of not guilty. It appears from the bill of exceptions, that "the State introduced as a witness one John G. Russell, who testified, that he saw the defendant David Elliott play at cards in August, 1853, in a room of a tavern kept at a public watering-place in said county; that the other defendant on trial was not engaged in the game, and in fact was not at the watering-place at that time. The State then introduced one William Hamilton as a witness, who testified, that he saw the same

playing by the said David Elliott testified to by the witness Russell; that on another occasion he and defendant Colley C. Elliott, with one or two other friends, went to the same tavern, and called for a private room for the night, and were shown into a different room from the one in which the other playing took place; that they went in, and locked the door, and engaged in a game of cards in which the said Colley C. Elliott participated; but on this occasion defendant David Elliott was not of the party, and was not at the watering-place at that time. The witness Russell had never seen Colley C. Elliott play at that tavern. The State then introduced as a witness one Henry M. Stanley, whose testimony was substantially the same as that of the witness Hamilton, except that he stated that said playings were near a month apart. The defendants introduced no evidence, and this was all on the part of the State.

"Upon this evidence, the defendants requested the court to charge the jury, that both defendants could not be convicted, unless there was proof of a playing at the same time and place. This charge the court refused to give, but charged the jury, that if it was proved to their satisfaction that the defendants played, as charged in the indictment, at a tavern, though they may not have played on the same day, nor together, and though there may have been no community of design between them, nor any connection between their playing, yet each defendant might be found guilty under the indictment; to which charge, as well as to the refusal to charge as requested, the defendants excepted."

The defendants also requested the court to charge, "that if the evidence showed that they played in a room in a tavern-house, which they had rented for the night, under lock and key, having called for it as a private room, they could not be convicted as for playing at a tavern"; which charge the court refused, and the defendants excepted to the refusal.

These rulings of the court are now assigned for error.

ROBINSON & JONES, for plaintiff in error:

If the charge of the court can be sustained, you may convict A and B under the same indictment for gaming, when the former played in Mobile in January, and the latter in

Huntsville in March; or you may convict them for a joint assault and battery upon C, when A beat him in Mobile in January, and B in Huntsville in March. The statement of the position shows its fallacy.—1 Archb. Crim. Pl. 97, and n. (2).

M. A. BALDWIN, Attorney General, *contra*, cited the following authorities: 2 Hale's P. C. 174; 1 Chitty's Criminal Law, pp. 254, 255, 270, 271; 5 Bac. Abr. 84; 8 Wend. 211; 8 East 46; 1 Blackf. 431; 7 Serg. & R. 476.

RICE, J.—The general rule as to the joinder of defendants, as laid down in works of good authority, is, that where the same evidence, as to the act which constitutes the crime, applies to two or more, they may be jointly indicted.—Commonwealth v. Elwell, 2 Met. 190. If the offence arise out of the same act, though the parties stand in different relations, they may be joined. If several be engaged in the commission of the same offence, though each may act a different part in the commission of that offence, they may be joined. 1 Waterman's Archb. Cr. Pl. 96; Wharton's American Cr. Law 110.

In Waterman's Archb. Cr. Pl. 97, the statute of 14 and 15 Vict., c. 100, § 15, is quoted, which enacts, that any number of accessories to a felony, or receivers of stolen property, may be charged with substantive felonies in the same indictment. In reference to that statute, and immediately after quoting it, the following statement is made: "But this is the only case, in which several persons can be joined in the same indictment, for several offences committed by them independently of each other."

We have no statute similar to that of 14 and 15 Vic. above referred to. We are, therefore, clear in the opinion, that an indictment would be fatally defective, if upon its face it charged several defendants for several offences committed by them independently of each other, some of which were committed by some of the defendants at one time, and some of which were committed by others of the defendants at a different time.

Where these facts do not appear upon the face of the indictment, but do appear on the trial from the evidence, the

defendants are as much entitled to the benefit and protection of the rules of law above laid down, as if the indictment had fairly stated the facts, and thus given them an opportunity to demur to it, or to move in arrest of judgment. The mere form in which an indictment may be drawn by the prosecuting attorney, ought never to be allowed to evade or destroy any substantial legal right of the defendant. However unobjectionable, on its face, an indictment may be, a conviction under it cannot lawfully result from proof of the indentical facts which would, if distinctly stated in it, vitiate the indictment, and enable the defendants, even after conviction, to arrest or reverse any judgment rendered on it against them.

The charge of the court below is not sustained by any of the cases cited by the Attorney General, and therefore we need not express our opinion as to the merits of those cases, further than to say that, if they are in conflict with our views as above expressed, we could not follow them.

For the error in the charge of the court below, its judgment is reversed, and the cause remanded.

ANTONEZ *vs.* THE STATE.

1. A sheriff has no power under the Code to admit to bail a person charged with a felony after indictment found, nor can that power be delegated to him by an order of the Circuit Court in these words: "And it appearing to the court that the offence with which the prisoner stands charged, namely, murder in the second degree, is bailable, it is ordered that, upon the prisoner giving good and sufficient bail, according to law, for his appearance at the next term of this court, in the sum of $1,000, then said prisoner be discharged from custody until the next term of this court."
2. Section 3408 of the Code, requiring the magistrate to endorse on the warrant of commitment the amount of bail required, applies only to preliminary proceedings before indictment found, and not to commitments after indictment.

APPEAL from the Circuit Court of Baldwin.

Tried before the Hon. C. W. RAPIER.

PERCY WALKER, for the appellant:

1. The indictment against Paine was for a felony; and, under the Code, bail could only be taken in open court, or by a judge in vacation.—Code, pt. iv, ch. 8, tit. 2; 15 Ala. 703.

2. The order of the court for the discharge of the prisoner, upon his entering into bond, was a nullity, as the court had no right to delegate its power.—Butler v. Foster, 14 Ala. 323.

3. The bond, judgment *nisi*, and *scire facias* did not correspond with the indictment: they varied from the charge described in the indictment, and were therefore wrong.—Howie v. The State, 1 Ala. 113; Farr v. The State, 6 *ib.* 795; Faulk v. The State, 9 *ib.* 919. The judgment *nisi* describes the charge as *murder*, while the bond describes it as *murder in the second degree*: this, under the authorities *supra*, is a fatal variance.

4. The Code requires bonds and recognizances, in criminal cases, to be made payable to the State of Alabama. This requirement, we think, is imperative; and the bond in this case, not being so drawn, was of no binding force.

M. A. BALDWIN, Attorney General, *contra*:

1. It is not intended to controvert the decisions in the cases of Butler v. Foster, 14 Ala. 323, and Governor v. Jackson, 15 *ib.* 703.

2. A circuit judge is a magistrate (Code, § 3339), and under section 3408 of the Code, has the right to authorize the sheriff to take bail in all bailable cases. The sheriff is restricted to cases of misdemeanors in taking bond, unless endorsed as above.—See section 3546.

3. The circuit judge, then, by endorsing on the commitment the amount of bail required, authorizes the sheriff to admit to bail. This authority does not depend upon the fact that it is endorsed on the commitment. The authority may be placed upon the minutes of the court.—Gray v. The State, 5 Pike 265.

4. The commitment and the authority of the sheriff are in the same order, and it is not for the sheriff to question the right of the court to make this order. This case is unlike the case in 14 Ala., *supra*. In that case, the order of the court was to take a recognizance, or a sum of money on deposit. A recognizance is an obligation of record, entered into before

a court or officer duly authorized.—2 Bouv. Law Dic. 413. The recognizance need not be signed by the conusors; it is a judicial act, and cannot be delegated. The order by the circuit judge in this case is not to take a recognizance, but a bond,—not to perform a judicial act, but a ministerial one. A bail bond is a specialty, or obligation under seal, by which a party becomes bound in a penalty for his appearance at court.—1 Bouv. Law Dic. 163. The judge may authorize the sheriff to take a bond independent of section 3408 of the Code; it is a power incidental to his office of circuit judge. It is not admitted, however, that a sheriff does not possess the power to take bonds and recognizances; he certainly had this power in the early history of that office.—State v. Mills et al., 2 Dev. 556.

5. There is no good reason why section 3408 should be limited to initiatory proceedings, or proceedings before indictment. This construction would be more liberal on the side of defendant than that section will warrant. If it had been the intention of the framers of the law to limit that section to initiatory proceedings, it would not have been left to inference.

6. It is not necessary that the bond should be payable as provided in the Code, § 3676.—See § 3684 of the Code, and Clay's Dig. 480, § 27.

CHILTON, C. J.—At the November term, 1853, of the Circuit Court of Baldwin county, one John Paine was indicted, under the Code, for killing one William Cameron and one John ———, whose surname was to the grand jurors unknown.

The prisoner being in custody, and it appearing to the satisfaction of the court that the jail of Baldwin county was insufficient for his safe-keeping, and that the jail of Mobile county was the nearest sufficient jail, it was ordered by the court that the prisoner be delivered by the sheriff of Baldwin to the sheriff of Mobile county for safe-keeping in the jail of that county until the next term of the Baldwin Circuit Court. The entry further proceeds as follows: "And it appearing to the court that the offence with which the prisoner stands charged, namely, murder in the second degree, is bailable, it is ordered that, upon the prisoner giving good and sufficient

bail, according to law, for his appearance at the next term of this court, in the sum of one thousand dollars, that then said prisoner be discharged from custody until the next term of this court."

It further appears that on the 10th day of November, 1853, James W. Lang, the sheriff of Mobile county, to whom the prisoner had been delivered, received a bail bond from said Paine, the prisoner, signed by the appellant, in the penal sum of $1,000, conditioned for the prisoner's appearance at the next term of the Baldwin Circuit Court, to answer to a charge of murder in the second degree.

Paine failed to appear at the next term,—a judgment *nisi* was rendered, on which a *sci. fa.* issued, and judgment final was rendered. Upon the return of the *sci. fa.*, the appellant, by his counsel, appeared, and made divers motions, viz., to dismiss the *sci. fa.*, to arrest the judgment *nisi*, and to quash the bond. These motions were severally overruled by the court, and its rulings are here assigned for error.

The question as to the liability of the appellant turns upon the legal sufficiency of the bond, and this depends upon the power of the sheriff to take it. Before the Code, the sheriff had no power to admit a party to bail who was charged with a felony.—Butler v. Foster, 14 Ala. 323; Governor v. Jackson, 15 *ib.* 703. Has the Code altered the law in this respect? We think not. If the offence is a misdemeanor, the sheriff, or his deputy, must discharge the defendant upon his giving bail. Code, § 3546. Section 3408, requiring the committing magistrate to endorse on the warrant of commitment the amount of bail required, does not apply to commitments after indictment found, but to commitments upon preliminary proceedings had for the arrest of offenders. There is no provision which authorizes the Circuit Court to delegate to the sheriff the power to admit to bail, except upon the trial of a *habeas corpus* (Code, §§ 3736-7-8); and without such statutory provision, the power does not exist.—Butler v. Foster, 14 Ala. 323. Indeed, the order in this case is not that the *sheriff* may admit to bail, but the prisoner is to be kept until he give bail "according to law." The effect of the order is merely to determine that the offence is bailable, and to fix the sum. Whether, upon *habeas corpus* to be admitted to bail, the judge trying the

same would be bound by such order, is a question we need not now discuss. It is clear that, so far as it may be construed as a delegation of authority to the sheriff to take bail, to that extent it is null and void.

It follows, as the sheriff had no power to take the bond, it is no more than so much blank paper, and the judgment rendered upon it is erroneous. It is therefore set aside, and this court, proceeding to render the judgment which the court below should have rendered, orders that said bond be quashed.

Judgment accordingly.

WILLIAMS *vs.* THE STATE.

1. A judgment in favor of the prosecutrix in a bastardy proceeding, "for her costs in this behalf expended," and requiring the defendant to enter into bond "conditioned that he pay to the judge of probate fifty dollars on the *first day* of January in each year for the term of ten years," &c.,—is materially different from a judgment requiring him to enter into bond "conditioned to pay fifty dollars a year for the period of ten years on the *first Monday* in January in each year," &c.
2. If the appeal bond, as set out in the record, describes a judgment materially different from that shown by the record to have been rendered in the cause, and does not show any undertaking for the costs of an appeal from the real judgment, it cannot be regarded as security for the costs, and the appeal will be dismissed.

APPEAL from the Circuit Court of Fayette.

Tried before the Hon. B. W. HUNTINGTON.

IT is unnecessary to state the facts of the case as shown by the assignments of error and bill of exceptions. The appeal was dismissed by the court *ex mero motu*.

E. W. PECK, for the appellant.

M. A. BALDWIN, Attorney General, *contra*.

RICE, J.—This is a proceeding in bastardy, and an appeal in such case is governed by section 3821 of the Code, which is in the following words:

"Either party may appeal to the Supreme Court within thirty days after judgment. If the appeal is taken by the State, the complainant must give security for the costs of the appeal if the judgment is affirmed; and the defendant also, if the appeal is taken by him, must give the same security, to be approved by the clerk of the Circuit Court, the names of the securities certified with the record to the appellate court; and execution may issue for the costs of the appeal against them from such court, if the judgment of the Circuit Court is affirmed."

The clerk has certified the names of the sureties for the costs of an appeal, and shows how they became such sureties by certifying as part of the record the copy of two bonds which appear to have been intended as bonds to secure the payment of the costs of an appeal in the cases respectively described in them. The first of these bonds is dated and approved on the 12th day of October, 1854, the same day on which the judgment of the Circuit Court was rendered. The second bond is dated and approved on the 23d day of December, 1854—more than "thirty days after judgment."

The first bond recites, that the appeal therein mentioned is taken in a case of bastardy on the complaint of one Susannah Winstead, in which John H. Williams had been convicted in the Circuit Court of Fayette county on the 12th day of October, 1854, and on conviction had been required by the judge of said court "to enter into the bond provided for such cases by section 3808 of the Code of Alabama"; and that he had given said bond with security, duly approved by said judge, in the sum of one thousand dollars, payable to the State, and "conditioned to pay fifty dollars a year for the period of ten years, on the first *Monday in January* in each year, for the support and education of said child." This first bond does not recite or show that any judgment for costs was rendered against said Williams in the case described in it, and in which the appeal it mentions was taken.

This bond does not describe the judgment which was actually rendered by the Circuit Court in the present case. For that judgment is a judgment in favor of the State, for the use of Susannah Winstead, for "her cost in this behalf expended", and does not require the said Williams to enter into

the bond provided for such cases by section 3808 of the Code, but does require him to enter into a bond materially different in a legal sense—to-wit, a bond "conditioned that he pay to the judge of probate fifty dollars on the *first day* of January in each year, for the term of ten years, for the maintenance of said bastard child." The judgment entry shows that he entered into the bond which the judgment required of him as above described.

It is clear, that if this court were to affirm the said judgment rendered by the Circuit Court, no judgment for costs could be rendered here against the sureties in the first bond, and no execution for the costs of the appeal could issue against them from this court; because the judgment described in that bond is materially different in its terms and legal effect from the judgment rendered by the Circuit Court in this case. A bond conditioned to pay fifty dollars on the *first Monday* of January in each year for ten years, is materially different from a bond conditioned to pay fifty dollars on the *first day* of January in each year for ten years. Sureties who are bound in respect to the former, are not thereby bound in respect to the latter.—Curry v. Barclay, 3 Ala. 484; Tarver v. Nance, 5 *ib.* 712.

As the bond first above mentioned (to-wit, the one bearing date 12th October, 1854) does not describe the judgment rendered by the Circuit Court in this case, or show any undertaking for the costs of an appeal from that judgment, that bond cannot be regarded as security for the costs of an appeal from that judgment;—and therefore no appeal was taken by that bond.—Carey v. McDougald, 25 Ala. 109.

The second bond, which is dated and approved 23d Dec. 1854, contains a description of the judgment rendered below, which would be sufficient to make it a good bond for the costs of an appeal from the judgment, if it had been executed and approved within thirty days after the judgment was rendered; but not being executed until after the thirty days, we must dismiss the appeal at the costs of the appellant.

Let the appeal be so dismissed.

MOORE *vs.* THE STATE.

1. Under an indictment for failing and neglecting to keep in repair a certain turnpike road, which defendant and another were authorized by private act of the Legislature to construct, the court cannot take judicial notice of the charter if it is not set out, but must look only to the allegations of the indictment; and if it alleges that the defendant alone accepted the charter, and erected toll gates and took toll by its authority, but does not allege that the charter authorized him to accept alone, or required him to keep the road in repair, it is fatally defective on demurrer.—Code, § 3501.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. JOHN E. MOORE.

The facts of the case will be readily understood from the opinion.

DAVID P. LEWIS, for the appellant.

M. A. BALDWIN, Attorney General, *contra*.

CHILTON, C. J.—The court below overruled a demurrer which was interposed to the indictment, and the questions for our examination arise upon its sufficiency.

It avers, in substance, that by an act of the Legislature of this State, passed on the 3d day of February, 1846, the defendant Moore, and one David G. Ligon, were authorized to turnpike a certain road which is described,—that said Moore accepted the provisions of said act, and in pursuance of the authority thereby conferred, did erect gates, and charge toll of persons passing thereon from the 1st March, 1838, until the finding of the indictment; that said Moore from the 1st day of March, 1853, until the finding of the indictment, did fail and neglect to keep said turnpike road in repair, &c., but suffered a section of it, which is described in the indictment, to remain uncleared, out of repair, and not in the condition required by their charter, for the space of ten days at one time, to-wit, between the 1st of March, 1853, and the finding of the indictment, not being hindered by high water, bad weather, or other good and sufficient cause, &c.

It is needless to inquire whether this indictment could be supported, according to the rules of the common law, the Code having made material changes as to the form required, and by this we must be governed. Section 3501 declares, "that the indictment must contain—1st, the name of this State, the county, court, and term in which it is preferred; 2d, a statement of the facts constituting the offence, in ordinary and concise language, without prolixity or repetition; *and in such a manner as to enable a person of common understanding to know what was intended*", &c. Does the indictment before us conform to these requisitions? As to the first, it is conceded that it does; but it is insisted that it does not as to the second, and we are of this opinion. The charter is not set out, and being a private act, we cannot take judicial notice of it. The indictment, then, is not aided by the charter, but must rest upon its own averments. It fails to charge that it was made the duty of Moore by the charter, to keep the road, &c., in repair. The charter, moreover, was to Moore and Ligon, and the indictment shows that Moore alone accepted; but there is no averment that the charter authorized him alone to accept. It is said, he erected gates by authority of the charter, and has taken toll, &c.; but this is a legal conclusion in the absence of the facts, for the court might draw a very different conclusion as to the question of power or authority had that portion of the charter been set out. Besides, it does not follow from this that Moore was bound by the charter to repair. This must be shown by the averments. 5 Bur. 2700; 2 Saund. 158 n. (9); 3 Ch. Cr. L. 571; 8 Wend. 214.

Judgment reversed, and cause remanded.

SPIVEY *vs.* THE STATE.

1. The statute of this State respecting the stealing inveigling, &c., of slaves (Code, § 3130) was intended to afford ampler protection and security to slave property than was afforded by the rules of the common law, and makes several radical changes in the common law.
2. When one man has carried away the slave of another, the question whether or not he is guilty of a felony (under section 3130 of the Code) depends on the intent with which the act was done; whenever there is not clear and satisfactory proof of the felonious intent denounced by the statute, concurring with the act of carrying away, there is no ground for a conviction.
3. At common law, a taking was necessary to constitute larceny; but not so as to all the offences created by this statute.
4. At common law, a bailee, who had acquired possession of goods without any intent at the time to steal them, could not, during the continuance of the bailment, commit larceny as to such goods, unless he broke the bulk or package; but this statute makes no such exception: it includes "any person" who commits either one of the acts denounced by it with the felonious intent indicated by its terms; it embraces the carrying away, &c., of "any slave," whether in the actual possession of the owner, or of a bailee, or in the merely constructive possession of the owner.
5. Conversion, and carrying away, are neither synonyms, nor convertible terms: a felonious carrying away of a slave necessarily includes a conversion, but a conversion does not necessarily include a carrying away; and a mere conversion, even with a criminal intent, is no felony, unless there is also a carrying away.
6. A charge is erroneous which instructs the jury "that, if they found there was a conflict between the special charges given by the court, at the defendant's request, and the main charge, then the latter must prevail."
7. The defendant's declarations, made while he was in possession of the slave, "as to the manner in which he bought him," are not admissible evidence for him under an indictment for stealing the slave (Code, § 3130).
8. But any evidence tending to prove that the defendant honestly believed that he had the right to carry away and sell the slave, is admissible for him; and therefore, where defendant had possession of the slave under a bailment from the former owner, (since deceased,) the declarations of the bailor, tending to show a sale to defendant, are competent evidence, although referring to a paper which is not produced and whose absence is not accounted for.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE indictment in this case was found at the June term, 1854, and charged, "that William H. Spivey inveigled, stole, carried or enticed away a slave named Joe, the property of Jo-

seph H. Skinner and George W. Skinner, with the intent to convert said slave to his own use." The defendant pleaded not guilty, was tried, convicted, and sentenced to the penitentiary for five years. During the progress of the trial he excepted to several rulings of the court, which are set out in the following bill of exceptions:

"On the trial of this cause the State introduced one Joseph W. Skinner as a witness, who testified, that he was the son of Henry A. Skinner, deceased, who died on the 4th day of October, 1853, in Mobile; that defendant had possession of the boy Joe, in the year 1853, for some time before the death of H. A. Skinner, but witness had no personal knowledge of the means by which defendant had acquired the possession; that said boy Joe had always been in the possession of H. A. Skinner, up to the time of his going into defendant's possession; that the mother of said boy belonged to said H. A. Skinner before the birth of Joe, and was in his possession when Joe was born; that said Joe belonged to witness and his brothers George and William Skinner; that witness was nineteen years of age, and his brother George about seventeen, and that William died several years since an infant; that the mother of Joe had been given, before Joe's birth, to witness and his said brothers by one Ann Hazzard, who had purchased her at sheriff's sale under an execution against said witness' father, H. A. Skinner; that he (witness) was absent from Mobile, at sea, from the year 1852 until after the death of his father in October, 1853; that some time in April, 1854, he saw defendant in Baldwin county, and asked him for the boy Joe; that defendant then told him that he had sold Joe in New Orleans for $600, and that he had purchased the boy from witness' father, in April, 1853, in this manner, viz., that one George Strickland, from Georgia, was in Mobile in 1853, who was indebted to him (Spivey), and witness's father was indebted to said Strickland; and that the two debts were paid by the sale of the boy Joe by witness' father to defendant. The witness further testified, that Spivey told him, in the same conversation, that witness' father, at the time of the sale, had said to him, 'I wish you would not dispose of the boy before the fall, as I wish to get him back if I can raise the money to pay for him.' These declarations of the defend-

ant were brought out by the State in its examination of the witness.

"Mrs. Skinner, the mother of the last witness, was then introduced by the State, and proved that the mother of the boy Joe had always remained in the possession of her deceased husband, H. A. Skinner; that (*Joe?*) had also, until about January, 1853, when he was placed by said Skinner in the possession of the defendant; that the defendant, who at that time was living in Mobile, applied to said Skinner to let him have Joe to nurse his (defendant's) children, saying that he was too poor to hire a slave, or to buy one; that thereupon she and her said husband permitted defendant to take the boy; that it was not stated, at the time Joe was delivered, how long defendant should retain him; that witness was well acquainted with the business of her late husband, and that he was in the habit of communicating to her all his business transactions; that she removed to Alabama with her said husband about twenty years since, and had continued to live in Clark county until within the last three years, and in Mobile since that time; that her husband came through Georgia on his way out, but he had never been in Georgia since that time; that she had never known or heard of any such man as George Strickland; that she never knew or heard of his being indebted to George Strickland, or having any business transactions with any one of the name of Strickland, and that she knew nothing of any sale of the boy Joe by her husband.

"F. S. Blount was then introduced by the State, and testified, that several years since he, as an attorney at law, had recovered three judgments in the Circuit Court of Clark county, against Henry A. Skinner, one in favor of —— Skinner, one in favor of Charles Skinner, and the third in favor of Ann Hazzard for about $400; that in 1846 certain negroes belonging to said Skinner were levied upon under the executions in favor of —— Skinner and Ann Hazzard, and were sold to satisfy the same; that at said sale he purchased for Ann Hazzard a negro woman, but he did not know whether she was the mother of Joe or not; that said Ann Hazzard was a governess in the family of said H. A. Skinner, and that the said judgment in her favor was for wages due for her services;

and that she was related to, or connected with, said Skinner's family. The State here closed its case.

"The defendant then introduced one Couch, who testified, that in 1853 he was the clerk of said H. A. Skinner, who kept a wood and lumber yard in Mobile, but he had nothing to do with said Skinner's business or estate after his death; and that he knew that Joe was delivered to defendant by said Skinner in January, 1853. The defendant then offered to prove by the witness, that a short time after said Skinner's death, he (defendant), who had been residing in Baldwin county for some months, came to Mobile, and asked witness this question, 'Who had charge of the business of Henry A. Skinner? that he wished to learn whether the family or representatives of the latter desired to reclaim Joe.' The court ruled this to be inadmissible, and excluded it from the jury; to which ruling the defendant excepted.

"The defendant then introduced one Longmaster, who testified, that in March or February, 1854, defendant came to witness' house in Mobile, and placed the boy Joe there for sale; that frequent and open efforts were made by defendant to sell the boy; that several persons called at witness' house, to examine the boy with a view to purchasing him; that the boy remained at his house for about ten days, and during that time defendant took him in public places and offered him for sale; that defendant removed the boy from witness' house, and placed him at a slave depot on Royal street, kept by one Harkey. The defendant then offered to prove by this witness declarations made by defendant of the manner in which he bought him, made at the time he brought the boy to witness' house; but the court ruled these declarations to be inadmissible, and refused to allow them to go to the jury; to which defendant excepted.

"The defendant then introduced one N. S. Morton, who testified, that in April, 1853, he was at H. A. Skinner's place of business in Mobile, and then heard Skinner say to defendant, 'Notwithstanding the acknowledgment, or arrangement, (witness not being certain which word was used,) in that paper, (referring to a paper then in the defendant's hands, which witness did not read, and the contents of which he did not know,) I wish you not to dispose of Joe before the fall, so

that I may redeem him if I can.' The court ruled this statement of Skinner's to be inadmissible, unless the paper was produced, or its absence accounted for; to which defendant excepted.

"There was other evidence before the jury. There was no objection to the main charge given by the court, but the court charged the jury, among other things, that, to make out the offence, it was not necessary that there should have been a felonious intent on the part of the defendant when he first acquired possession of the boy, and that, although the defendant's possession may have been lawful, yet the offence was made out, if he subsequently fraudulently and feloniously converted the boy to his own use; and that, though the defendant may have held the boy as bailee before he sold him, still he would be guilty, if the jury believed from the testimony that he had fraudulently and feloniously converted the boy to his own use; to which charges the defendant excepted.

"The defendant asked the court to charge as follows:

"1. If the jury believe from the evidence that Spivey acquired possession of the boy from H. A. Skinner under a contract of bailment, and that he converted him to his own use while so possessed by him, they could not convict; which charge the court refused, and the defendant excepted.

"2. If the jury believe from the evidence that, at the time Spivey first acquired possession of the boy, he intended to convert him to his own use, he could not be convicted under this indictment; which charge the court refused, and the defendant excepted.

"The defendant also asked the court to give the following charges, viz.: If the jury believe from the evidence that there was a sale of the boy by H. A. Skinner, to defendant, they must acquit; that if the jury have a reasonable doubt, whether there was a sale or not, they must acquit; that the declarations of the prisoner, brought out by the State, must be considered by the jury as evidence in the cause, and, unless they were shown by proof to be untrue, such declarations must be taken by them as showing a claim of title in Spivey; that if the jury believe from the testimony that Spivey had a claim of title to the boy at the time he sold him, he could not

be convicted; that, to authorize a conviction, the proof must be clear and convincing, and exclude every other supposition than that of innocence; which charges the court gave. There was some discussion by the defendant's counsel, while he was asking charges, which produced some confusion, and the court then told the jury, that, if they found that there was a conflict between the special charges asked by the defendant and given, and the main charge, then the latter must prevail; to which the defendant excepted."

All the rulings of the court, above stated, to which exceptions were saved, are now assigned for error.

PERCY WALKER, for the plaintiff in error:

1. Though the statute under which the indictment was framed contemplates an offence different from larceny, yet, to apply the statute understandingly to a particular state of facts, we must resort to the rules of law applicable to larceny. The rule is familiar, that where goods have been delivered into the hands of a bailee for a special purpose, who thereby acquires a right to the possession, and who, if he converts them to his own use while in his possession as bailee, even *animo furandi*, is not guilty of a trespass, he is not guilty of larceny. 1 Hale's P. C. 504; 4 C. & P. 241; 1 Moody's C. C. 474; Russ. & Ry. 92. This rule, it is conceived, is directly applicable to the case at bar. The indictment is, in effect, a charge of larceny; it contains the essential element of a charge for that crime, viz., the fraudulent intent of conversion to the taker's use; without such an intent, the offence designated in the statute (Code, § 3130) would not be complete. The cases of Mooney v. The State, in 8 Ala., and Williams v. The State, in 15 Ala., do not militate against this construction.

The bill of exceptions shows, that Spivey's possession, in the first place, was that of a bailee. H. A. Skinner, the party holding and exercising ownership over the slave, voluntarily delivered him to the defendant. It is immaterial whether H. A. Skinner was the real owner of the slave, or not: as the father and natural guardian of his children, he had the rightful possession and control; and the defendant, in receiving the slave from him, acquired a lawful possession. The case is one of bailment. The possession was parted with by the

bailor without any fraud on the part of the defendant, and nothing was afterwards done to determine the privity of contract; the subsequent conversion was no trespass, and consequently no larceny.—2 Russ. on Crimes, pp. 34-5, 56; 2 Archb. Cr. Pl. (Waterman's ed.) 382, and note; *ib.* 387. And though the conversion did not take place until after the death of H. A. Skinner, still no crime was committed; the defendant's possession was lawful, and would have entitled him to an action for damages done to the slave.

There is nothing in the record showing any inveiglement or enticement. These terms (inveiglement and enticement) apply to acts operating on the mind of the slave. Moreover, it is submitted, the words "inveigle and entice" apply to those cases only where the slave is induced or persuaded to leave his owner's possession—that is, that the slave is in the *actual* possession of his owner when the attempt to entice or inveigle him is made; and when, as in this case, the possession was lawful in the first instance, and continued for a long time with the knowledge and consent of the owner, the subsequent fraudulent conversion by the bailee cannot be regarded as an inveiglement or enticement within the statute. These words were used by the legislators with reference to the allegiance which the slave owes to his master, and must (as before observed) be restricted in their application to cases where the slave is in the actual possession of his owner; and therefore, where A hires a slave to B, or places him in B's possession for his use, if the latter, without having any fraudulent intent at the time he receives the slave, subsequently fraudulently converts him to his own use, neither one of the offences prohibited by section 3130 is made out: it is a mere breach of trust.

To make out either one of the offences created by section 3130, there must be, not only a felonious intent, but both a taking and a carrying away. The words "steal" and "carries away," as used in the statute, are synonymous with "take" and "carry away," which were essential in a common-law indictment for larceny. The word "take" does not mean the act of asportation, but the act of laying hold upon an article, with or without removing the same.—Bouv. Law Dic. p. 549. If a man takes hold of a package with a felonious intent, but does not remove it, the offence is not complete; there must be

an actual asportation—a complete severance of the possession; and this cannot be done without a carrying away. In several cases a slight removal has been held sufficient, (as removing a package from the head to the tail of a wagon; taking sheets from a bed and carrying them to an adjoining room; taking plate from a trunk, and placing it on the floor, with intent to carry it away, &c.,) but it has always been held that there must be an actual asportation.

2. The court erred in excluding from the jury the declarations of the defendant made to the witnesses Couch and Longmaster: they tended to show a claim of property in the slave, and, having been made before the conversion, they should have been allowed to go to the jury, leaving the *bona fides* to their consideration.—See Wisdom's case, 8 Por. 511.

3. The court erred, also, in excluding from the jury the testimony of Morton, as to the declaration of H. A. Skinner to the defendant in April, 1853: that declaration formed a part of the *res gestæ*, and should have been received in evidence. Whether or not the paper referred to by Skinner was produced, or its absence accounted for, was immaterial: the witness was not called to prove the contents of the paper; the inquiry was as to the nature and character of the transaction between Skinner and the defendant, and what was said by both parties was clearly admissible. This statement of Skinner tended to elucidate the act of the defendant: it authorized the inference that there had been a sale of the slave, and its withdrawal from the jury necessarily worked injustice to the defendant. The admissibility of a declaration depends, not merely on its accompanying an act, but on the light which it throws on an act which is, in itself, relevant and admissible.—Wright v. Doe *ex dem.* Tatham, 34 E. C. L. R. 313; 33 *ib.* 426; Roscoe's Criminal Evidence, pp. 22 *et seq.*

4. The argument on the first point shows, that the main charges given by the court were erroneous, and that the refusals to give the first and second charges asked by defendant were erroneous. The refusal to give the latter charge was also erroneous, because such refusal was inconsistent with the charges previously given.

5. The charge which instructed the jury, "that if they found there was a conflict between the special charges asked

by defendant and given, and the main charge, then the latter must prevail," was erroneous: it tended to give an undue preponderating power to the main charge, and to weaken and neutralize the effect of the special charges, which the court ought not to have given at all unless they were in accordance with the law; it also referred a question of law to the decision of the jury, viz., whether or not there was a conflict between the main charge and the special charges.—Cothran v. Moore, 1 Ala. 423; 3 *ib.* 237; 5 Porter 64; 2 Stew. & P. 193; 1 Ala. 452; 3 *ib.* 599; 8 *ib.* 607; *ib.* 737; 6 *ib.* 631; 9 Porter 403.

M. A. BALDWIN, Attorney General, *contra*:

1. To have suffered the different declarations of the prisoner made to witnesses Couch and Longmaster, would have been a violation of that rule which prevents a party from manufacturing testimony in his own case.—Oliver v. State, 17 Ala. 595.

2. The testimony in relation to the paper was properly excluded, the loss of the paper not being proved.

3. The bill of exceptions states that there was other testimony not set out. The presumption is, there was testimony upon which an affirmative charge is based. In this view, the charge of the court is correct; for there are cases in which a party comes into the possession of property, and a subsequent conversion is felony; for instance, carriers and bailees, who terminate the contract by some tortious act.—Roscoe 597-8, and note (3); 1 Hale 505; 2 East 659, 682.

4. Suppose the owner, Skinner, had requested the prisoner to return the slave, and he had refused: or, suppose defendant had taken the boy from the service, for which he was obtained, to-wit, nursing his children, and had placed the boy to rafting logs. In both instances the contract of loan would have been determined, and the possession thrown upon Skinner, the owner (23 Ala. 534, and 18 *ib.* 348). A fraudulent conversion after this would have been a felony.

5. The loan was for an indefinite time, but, by virtue of law, terminated on the death of Skinner, the lender, and an administration of his estate (see Code, § 1724). And if a conversion is made after a completion or termination of the contract, it is felony.—Commonwealth v. James, 1 Pick. 385.

6. But it has been said by this court, that from the phraseology of this statute, and the mischief intended to be prevented, it was the intention of the Legislature to create an offence essentially distinct from larceny at the common law. The possession of neither party makes any difference, if the slave is induced by persuasion to leave his master's service.—Mooney v. State, 8 Ala. 333; Williams v. State, 15 *ib.* 263.

7. As the charges in chief of the court are not set out, it does not appear how the prisoner has been injured as to the charge that charges in chief must govern where there is conflict between them and special charges.

RICE, J.—To constitute the offence of larceny, according to the common law, there must be a taking from the possession, a carrying away against the will of the owner, and a felonious intent to convert the thing taken to the offender's use.—3 Chitty's Cr. Law 917.

According to section 3130 of the Code, "*any person* who inveigles, steals, carries, *or* entices away *any slave*, with intent to convert such slave to his own use, or the use of another, or to enable such slave to reach a state or country where he would enjoy his freedom, must, on conviction, be imprisoned in the penitentiary not less than five or more than twenty years."

This section is, in substance, a transcript of a former statute, which had been examined and commented on by this court as long ago as 1845.—Mooney v. The State, 8 Ala. 328.

Experience had demonstrated, that the mere application of the rules of the common law, upon the subject of larceny, to slave property, was totally inefficient to protect this, the most valuable species of personal property owned in this country. To give the most ample protection to this kind of property, it became necessary to make a radical change in the common law. Slaves, being intelligent creatures, possessing volition, as well as the power of locomotion,—capable of being deluded by art and persuasion, as well as of being compelled by fear or force,—it was proper, in making the change of the common law, to resort to terms suited to the nature of the property intended to be protected. The section above cited was, therefore, intended literally, as it is expressed, to embrace all who

should either "inveigle, steal, carry, *or* entice away any slave", with either of the intents therein expressed.—State v. Miles, 2 Nott & McC. 1; State v. Covington, 2 Bailey's Rep. 569; State v. Haskell, 33 Maine 127.

Where one man has carried away the slave of another, the question whether he is guilty of a felony or not, under section 3130 of the Code, depends on the intent with which it was done. The criminal intent, and the act denounced by that section, must both concur, to constitute a felony. If the slave was carried away by the consent of the owner, or of any person authorized to give such consent, such carrying away could not be a felony. So, if the carrying away was without any intent to deprive the owner of the subsequent use and benefit of the slave or of his value, it would not amount to a felony. So, if the carrying away was under an honest belief, in the mind of the person who carried away the slave, or caused him to be carried away, that he had the right to carry him away, or to cause it to be done, the person acting under such honest belief does not thereby become a felon, although he may be wholly mistaken in such belief. In short, whenever there is not clear and satisfactory proof of the felonious or corrupt intent denounced by the statute, concurring with the carrying away of the slave, there is no ground for a conviction for carrying away the slave.—Oliver v. The State, 17 Ala. 587.

We have selected the words "carry away", in the foregoing comments, for the sake of perspicuity; and having begun upon them, we shall make no special comment on the other words, "inveigle, steal or, entice away."

The following circumstances ought to be carefully considered, in construing the section above cited. At common law, *a taking* was essential to constitute larceny. Not so, as to all the offences created by this section. This omission in the statute of *a taking* is significant. At common law, certain persons (for instance, bailees), who had acquired possession of goods without any intent at the time to steal them, could not commit larceny as to such goods during the time for which they were by contract to keep possession of them, unless they broke the bulk or package. But this section makes no exception—it includes "*any persons*" who may do either of the acts denounced by it, with the felonious intent indicated by

its terms. It embraces the carrying away of "any slave", whether in the actual possession of the owner, or of a bailee, or in the mere constructive possession of the owner.

The property of the owner, in a slave hired or bailed by him to another, is recognized by law. There is as much reason for protecting it against the felonious carrying away of the bailee, as against the felonious carrying away of a third person. The law has established bounds between the interests of the bailor and bailee in the thing bailed. If the bailee transcends these bounds, and invades the rights of the bailor in the slave, by a carrying away of the slave, with the felonious intent expressed in the statute, he thereby incurs its penalty.

Conversion, and carrying away, are not synonyms, nor convertible terms. An unauthorized, illegal, and felonious carrying away of a slave necessarily includes a conversion. But a conversion does not necessarily include a carrying away. There may be a conversion, without any carrying away; and in that case, there is no felony, although the intent of the conversion is criminal.

In determining whether there has been a carrying away, the common-law rules in relation to the *asportavit* in larceny ought to govern,—with this qualification, that the bailment, or hiring, itself cannot be regarded as giving the consent of the owner to any *asportavit* of the slave by the bailee, when coupled with the felonious intent expressed in the statute, nor as authorizing any *asportavit* with such intent.—The State v. Covington, 2 Bailey's R. 569; 4 Black. Com. 231, and note 7.

Sound exposition requires effect to be given to every significant clause, sentence, or word in a statute. The common usage of the words at the time of the enactment is the true criterion by which to determine their meaning.—Smith's Com. on Stat. 630, 710.

The letter and spirit of the section in question seem to us to require the construction which we have above indicated. Any other construction would render at least some material part of the section utterly inoperative.—State v. Miles, 2 N. & McC. 1.

If there seems to be any hardship in this construction, we are not answerable for it; the Legislature has so made the law, and we must give it effect. But we confess we see no-

thing very shocking in punishing any man, who by bailment has been entrusted with the use and possession of a slave, and who afterwards, in disregard of the bailment, carries him away with the corrupt intent of depriving the owner of his property in him, and of converting him entirely to his own use.

Even under the common law, it has been decided, that if a man steal his own goods from his own bailee, though he has no intent to charge the bailee, but his intent is to defraud the king, yet, if *the bailee had an interest in the possession, and could have withheld it from the owner, the taking is a larceny* (Rex v. Wilkinson, Russ. & Ryan's C. C. 470); and also, that if a *part owner* of property steals it from the person in whose custody it is, and who is responsible for its safety, he is guilty of larceny.—*Ib.* 478. Why, then, should it be thought harsh, for the Legislature to declare that a bailee might be convicted of felony, if he carried away a slave with either of the intents specified in the statute now under consideration? Is not such carrying away as flagitious an invasion of the right of property of the owner, as a taking from his actual possession and carrying away with the same criminal intent? Although the actual injury to the owner may not be quite as great in the one case as in the other, yet the injury, in legal contemplation, is equally clear in each case. And our opinion is, that both these cases are alike embraced by the letter, spirit, and intention of the section of the Code in question.

Under this construction of the statute, the error of that part of the main charge of the court which is set forth in the bill of exceptions, consists in its assertion, that the defendant was guilty, "if he had fraudulently and feloniously converted the boy to his own use", without referring to the jury the true question, whether he had carried away the slave with the felonious intent to convert him to his own use.

There was no error in refusing the charges asked by the defendant.

There is error in the charge which informed the jury, that, if they found that there was a conflict between the special charges asked by the defendant and given, and the main charge, then the latter must prevail. It was the legal right of the defendant to ask charges to be given. It was the duty of the court either to give or refuse them. If they were refused,

the defendant had the right to take his exceptions, and obtain a revision of the refusals in this court. If they were given, the defendant was thereby deprived of his right of exception and revision. It is manifestly unjust, as well as unlawful, after the defendant's right of exception and revision has been taken away by the giving of his charges as asked, to tell the jury, that they ought to deny him any benefit from those charges "if they found that there was a conflict" between them and the main charge. Whether there was such a conflict, was a question exclusively for the court. If such a conflict existed, the court should either have withdrawn that portion of the main charge which conflicted with the special charge asked, or have refused the special charge. The court cannot avoid the decision of any question of this kind, by devolving that task on the jury.—Long v. Rogers, 17 Ala. 548; DeGraffenreid v. Thomas, 14 *ib.* 681.

There was no error in rejecting the proof which defendant offered to make by the witnesses Couch and Longmaster.—McBride v. Thompson, 8 Ala. 650; Thompson v. Mawhinney, 17 *ib.* 362; 17 *ib.* 109, 216, 314.

There was error in excluding the statement of Skinner which the defendant offered to prove by the witness Morton. It was a material question, whether the defendant honestly believed he had the right to carry away and sell the slave in the spring of 1854. If the defendant obtained the slave from said Skinner, and honestly believed that Skinner was the real owner, and as the real owner had conferred on him the right to carry off and sell the slave, and under such belief carried away and sold the slave, he is not guilty of any felony. In this point of view, it is clear that the statement of Skinner above referred to, should have been allowed to go to the jury. We do not say, that the jury were bound to believe it, nor how much weight it was entitled to. We say it was admissible, and that the failure of the defendant to produce the paper, or account for its absence, did not render the statement of Skinner inadmissible. Such failure goes to the credibility, but not to the competency, of the testimony. Evidence is often competent, although entitled to little or no credit.

For the several errors of the court below, above pointed out, its judgment is reversed, and the cause remanded.

BROCK *vs.* THE STATE.

1. On the trial of an indictment for arson, after the State has proved the burning of the house as charged, and offered evidence tending to show that the defendant was the person who set fire to it, evidence showing that another house belonging to the prosecutor was subsequently burned, is irrelevant and inadmissible; nor is it made relevant by being offered in connection with proof of defendant's declaration, made after the first but before the second burning, that he was not yet done with the prosecutor, especially when the declaration is shown to have been made in a conversation, in which "no reference was made to either of the burnings, but the parties were speaking of a civil case which defendant had before the prosecutor as a justice of the peace, and in which defendant complained the prosecutor had treated him rascally."
2. When female relatives of the defendant, whose evidence is material to his defence, are examined on his behalf at the trial, they cannot be impeached by proof that they were present at the examination before the committing magistrate, and were not then examined as witnesses, although the same evidence was then adduced against him as upon the trial.

ERROR to the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

JEFFERSON BROCK, the plaintiff in error, was indicted at the March term, 1854, of the Circuit Court of Shelby, for arson; the charge being, that he "wilfully set fire to and burned an out-house of John A. Griffin." On his application the venue was changed to Talladega, where he was tried at the Fall term, 1854, and convicted, and sentenced to three years' confinement in the penitentiary. He excepted to several rulings of the court during the progress of the trial, which are thus stated in the bill of exceptions:

"The State, having proved that a house belonging to one Griffin, which was filled with oats at the time, had been burned about midnight on or about the 21st August, 1853, and having introduced evidence tending to show that defendant had set fire to it,—proposed to prove by a witness that another house belonging to said Griffin had been burned subsequent to the burning of said out-house for which defendant is charged in this indictment. To the introduction of this evidence defendant objected, because it was illegal and irrelevant;

whereupon the State offered this evidence in connection with evidence of a conversation had by this witness with the defendant, between the first and the second burning, in which conversation defendant said, that he was not yet done with Griffin. The witness stated, that in this conversation not a word was said in reference to the burnings, or either of them, but they were speaking of a civil case which defendant had in a justice's court in April before, and in which defendant complained that Griffin, as justice of the peace, had treated him rascally. In this connection the court allowed said evidence to go to the jury, and the defendant excepted.

"The defendant introduced his mother as a witness, who testified, that she was quite sick on the night when Griffin's out-house was burnt, and did not go to bed or sleep that night; that defendant was at her house on that night, and went to bed early, and did not leave the house that night. The State then offered to prove by this witness, that she was present when defendant was tried before the committing court upon this charge; that the evidence for the State, upon that trial, was the same that it is upon this; that she knew the same facts at that time that she now deposed to; and that she was not examined as a witness on said trial before the committing court. The defendant objected to this evidence, as being illegal and irrelevant; but his objection was overruled, and the evidence admitted, and defendant excepted.

"The defendant introduced another witness, who was his sister, for the purpose, among other things, of proving that one Allen, the State's witness, had told her before defendant was indicted, that if he was prosecuted by defendant's brother for stealing bacon, he would swear the burning of Griffin's out-house on defendant; which she did, the proper predicate being laid, and said Allen having denied, on his cross-examination as a witness for the State on this trial, ever making any such statement. The State then proved by this same witness, on cross-examination, that she was present when defendant was tried before the committing court; that said Allen, who was then a witness, proved in substance the same things that he had on this trial; that she was examined as a witness at the same time, and did not testify as to said contradictory statement of Allen. To the making of this proof

by the State, on the ground that it was illegal and irrelevant, the defendant objected; but the court overruled the objection, and admitted the evidence, and defendant excepted."

The rulings of the court are now severally assigned for error.

MORGAN & MARTIN, for the plaintiff in error.
M. A. BALDWIN, Attorney General, *contra*.

CHILTON, C. J.—1. There is no connection whatever between the offence for which the prisoner was charged, and the declaration that "he was not done with Griffin yet," made afterwards. On the contrary, the evidence shows that no allusion was made to the burning, but to judicial proceedings had before Griffin as a justice of the peace. Neither is there any evidence connecting the prisoner with the subsequent burning. These facts, being disconnected, independent circumstances, afforded no fair or reasonable inference tending to establish the guilt of the prisoner in respect of the charge upon which he was tried. A presumption is a *probable* inference which our common sense enables us to draw from circumstances usually occurring in such cases—an act of reasoning, by which the existence of one fact is *inferred* from the existence of other facts which are *known*. In the case before us, no presumption of guilt can be indulged as deducible from the prisoner's declaration, and from the second burning, without first *assuming* that such declaration had reference to the first burning, as an implied admission of the prisoner's guilty agency in it, and as evidence of his intention to repeat the offence in future. This assumption cannot be indulged, especially in the face of the testimony, which strongly tends to point the declarations to a different matter. There is, therefore, no known fact, or premise, furnished by the proof objected to, from which a reasonable and fair inference can be drawn. Hence we are of opinion, the proof was improperly admitted.

2. We are further of the opinion, that the court erred in permitting the State to prove, as a means of impeaching the mother and sister of the prisoner, who were examined as witnesses on his behalf, that the same proof was given against the prisoner before the committing magistrate that was made upon the trial,—that they were both present and were not

examined; it appearing that their testimony was material to his defence. Although related to the prisoner, they were not bound, at the hazard of being impeached, to thrust themselves as witnesses upon the court. The known delicacy of the sex usually makes them shrink from examinations of the kind, and no inference prejudicial to their veracity could be legitimately indulged from their failing to volunteer as witnesses before the magistrate. A presumption that they had sworn falsely, predicated upon the circumstance that they were not sworn before the examining magistrate, is too strained and far-fetched to be allowed.

Let the judgment be reversed, and the cause remanded.

BRISTER ET AL. (SLAVES) *vs.* THE STATE.

1. Every person indicted for a capital offence, if he is in actual confinement, is entitled to have a copy of the indictment delivered to him at least two entire days before the day appointed for his trial (Code, § 3576): delivery to his counsel is not sufficient.

   But if the defendant objects to going to trial, "on the ground that a copy of the indictment has not been served on him *or his counsel* two entire days before the trial", and it is shown that a copy was delivered *to his counsel* two entire days before the trial, there is no error in overruling the objection, as the form in which it is made is a waiver of the right to personal service if a copy has been delivered to counsel.

   When the venue is changed on the defendant's application (Code, § 3615) the certified copy of the indictment becomes so far an original, in the court to which the trial is removed, that a copy of *it*, when delivered to the prisoner, will be a sufficient compliance with the statute, and have the same effect that a copy of the actual original could have.
2. If the transcript furnished by the clerk, on change of venue, is duly certified by him to contain a copy of the caption of the grand jury, the indictment, with all the endorsements thereon, and all the entries and orders made in relation to the cause, including the order for the removal of the trial, as required by the Code (§ 3613), the defendants may be tried on such transcript.
3. Where there is a joint trial under a joint indictment, each defendant may challenge the whole number of jurors to which he would be entitled if tried separately.
4. In criminal prosecutions, neither party can be permitted, except by mutual

consent, to withdraw the trial from the jury to the court by a demurrer to the evidence.

5. A witness who is introduced by the State to prove the defendants' confessions, and who states, on re-examination, "that he had testified to the substance of all that each of said defendants stated on that occasion, but that they may have stated something which he did not recollect", is competent to testify to the confessions, if in themselves admissible.

6. The general rules stated, which should govern the court in deciding upon the competency of confessions, and the jury in determining their credibility and effect after they have been admitted by the court. Distinction also stated between the sphere of the judge and the sphere of the jury.

7. As to the construction of the bill of exceptions, which showed two separate objections by the defendants to the admission of their confessions: It was *held* by a majority of the court, that the last of these objections was so made as to present the question, whether upon the evidence previously set out in the bill of exceptions, the confessions were admissible, and that the court below erred in overruling this objection and admitting the confessions; while RICE, J., *dissenting*, held that there was no error shown by the record in overruling either of said objections.

8. Charge of the court on the subject of confessions, and its refusal to charge as requested, held correct.

9. When several defendants are jointly indicted and tried, if there is any evidence against one, the court may overrule the motions of his co-defendants "to introduce him as a witness, on the ground that there was no evidence against him to authorize him to be put on his defence", and "to direct and allow the jury to return a verdict of acquittal as to him, on the ground that there was no sufficient evidence of his guilt to require him further to defend." Code, § 3594.

10. An abstract charge properly refused.

11. If the indictment charges that A gave the mortal blow, and that B and C were present aiding and abetting, while the evidence shows that B struck the blow, and that A and C were present aiding and abetting, this is not a material variance, for the blow is adjudged in law to be the stroke of every one of them.

12. Charges of the court examined and held correct.

13. If the verdict of the jury is received, and read aloud in open court, in the absence of the prisoners and the jury are then told by the court that they are discharged, it is within the power of the court to call them back before they have left the bar; and if they are immediately recalled, upon the discovery being made that the prisoners are not in court, and the papers in the cause are handed back to them, the prisoners are not deprived of their right to poll the jury, nor can they complain on error of this action of the court.

14. The improper conduct of the jury, after they have retired to make up a verdict, is not a ground for a motion in arrest of judgment.

15. Misconduct of the jury is a ground for a motion for a new trial, but the action of the court in refusing a new trial on that ground is not revisable on error.

ERROR from the Circuit Court of Bibb.

Tried before the Hon. ANDREW B. MOORE.

At the Spring term, 1853, of the Circuit Court of Perry, an indictment for the murder of one John Rickard was found against the following named slaves, viz., Wash, George, Collins, Brister, Cæsar, Jeff, Bill, John Rodgers, Jerry, John Wallace, and Archer; the indictment charging that Wash struck the mortal blow. At the same term of the court, a *nolle pros.* was entered as to the defendant Jerry; the defendants John Wallace, Wash and George were tried, convicted, and sentenced to death; and the cause was continued as to the other defendants, on their application. At the next term of the court, on the application of the defendants, the venue was changed to Bibb county, where a trial was had at the ensuing Fall term, 1854. Several exceptions were taken to the rulings of the court during the progress of the trial, which are stated in the bill of exceptions as follows:

"The defendants objected to going to trial, on the ground that a copy of the indictment had not been served on them or their counsel, two entire days before the trial; but it being shown to the court that a copy of the copy of the indictment set out in the transcript sent up by the clerk of the Circuit Court of the county of Perry was delivered by the clerk of the Circuit Court of Bibb to the counsel of said defendants at the last term of this court, the court overruled the objection, and decided that said defendants should go to trial, so far as the said objection was concerned; and said defendants thereupon excepted.

"All of said defendants further objected to going to trial before the Circuit Court of Bibb county, on the ground that the following transcript did not show that the facts therein set forth did *not* appear of record on the records of the Circuit Court of Perry; and further, because the clerk showed by his certificate that he was certifying the proceedings in a different case from that shown in the indictment and in said transcript; and, 3d, that said defendants could not be legally put on their trial on said transcript." The transcript referred to is then set out at length in the bill of exceptions, showing the organization of the grand jury by whom the indictment was found, and containing a copy of the indictment, with the endorsement thereon, and all the orders of the Circuit Court of Perry in relation to the cause; and appended to it, is the

certificate of the clerk of that court, that it is "a full, true, and perfect transcript of the organization and caption of the grand jury, the indictment, with all the endorsements thereon, and all entries relating thereto, and the order for the removal of the trial, and all other orders in the cause, embracing the recognizances of the State's witnesses, and all other proceedings had by the court aforesaid, in the case of the State of Alabama (plaintiff) against John Wallace, Wash, George, Collins, Cæsar, Brister, Jeff, Bill, John (*alias* John Rodgers), and Archer (*alias* Archie), slaves, as defendants; all of which appears to us of record." The bill of exceptions then proceeds: "But the court overruled their objections, and all the said defendants excepted.

"In selecting the jury for their trial, after the (*State ?*) had accepted a juror named Walker Fitts, and the defendants Jeff, Cæsar and Brister had acknowledged themselves satisfied, and also accepted him as a juror by whom, with others, to be tried, said juror was challenged by three others of the defendants, viz., Bill, John, and Archer; and the court, against the objection of said Jeff, Brister, and Cæsar, allowed said challenge, and rejected said juror; and thereupon said Jeff, Brister, and Cæsar excepted." Eight other jurors, who had been accepted by the State and said Jeff, Brister, and Cæsar, were in like manner rejected by the court on the challenge of the other defendants; and to each rejection the defendants Jeff, Brister and Cæsar excepted. Six other jurors, who had been accepted by the defendants Bill, Archer, and John, were challenged by the other defendants, and set aside by the court; and to each rejection the three first-named defendants excepted.

"On the trial of the cause, the following facts appeared in evidence: That the body of John Rickard was found interred in the bank of a ditch in Perry county about the 23d of February, 1853; and on examination of it, it was found that two wounds had been inflicted on the side of his head, which had fractured his skull, and produced his death; that he disappeared about the 12th of January, 1853, and was not afterwards seen until his body was discovered, as above stated; that the deceased was a ditcher by trade, and at the time of his death was engaged in cutting a ditch on the plantation of

Mr. S. F. Pool in Perry county, about twenty feet in width; that he had thirteen negro men (slaves) in his employment as a ditcher, who worked under him in ditching, among whom were the prisoners and three others, viz., John Wallace, Wash, and George, who had heretofore been tried, convicted, and executed for the murder of deceased; that the deceased and said thirteen slaves lived on the plantation aforesaid, and together occupied a cabin thereon, about sixteen feet square, in which they slept at night, and in the centre of which the fires were made; that the deceased was the only white person that staid with or where said slaves were; that some time after he disappeared, suspicions were aroused amongst the neighbors that he had been killed by said slaves, who still continued to work together on the ditch, which deceased was cutting when last seen, under the direction of John Wallace, who was the foreman of the deceased; that by a previous understanding some sixteen or seventeen of the neighbors, some of whom were armed with double-barreled guns, others of them having negro whips commonly used by overseers, and others with sticks, went, about the 23d February, 1853, to the place where said slaves were staying on said Pool's plantation; that one of the company also carried along a pack of negro dogs, which were known to be such to all the prisoners, Jeff, Cæsar, Brister, and John Rodgers; that at the cabin, where said Rickard had staid, they found one of the boys who was in the employment of Rickard, and that he was placed in charge of the company; that others of the company went down to the ditch, about two hundred and fifty yards from the cabin, where said slaves were at work, and, after getting them all together, took them in custody, the prisoners being included in the number taken; that one or more of said company took each one of said slaves in charge, and in this way they were all marched up to or near said cabin; that Thos. Phillips, one of the company, carried the boy Cæsar to the cabin, and on the way, as said Phillips testified on the trial, he discovered that Cæsar was much alarmed, so much so that he trembled; that Phillips told him not to be alarmed,—that all they had come here for was, to find what had become of old man Rickard; that after the slaves were assembled near said cabin, some of them were tied, and the company then

separated them a short distance from each other, for the purpose of examining them,—the place, however, being open, so that any one of them might see what was being done to the others, and they not being so far separated but that they could hear any blows that might be inflicted on any of them in whipping; that before they were separated the last time, near the cabin, some one of the company stated in their hearing that they had come to find out what had become of the deceased; that Phillips again took the boy Cæsar in charge, to examine him, and that he denied all knowledge of the deceased being killed. One of the witnesses, a slave who was a witness on the trial, testified, that according to his best recollection, one of the company commenced whipping Bill, in view of the prisoners Jeff, Brister, Cæsar and John Rodgers, before any confessions were made by any of said slaves except a boy by the name of Ned; but another witness, a white person who was one of the company, testified, that he did not recollect whether the confessions were made before or after the commencement of the whipping of said slaves.—There was some conflict in the testimony, as to whether the confessions were made before or after the boy Bill Stokely (one of the accused) was whipped. A witness for the State, one J. F. Pool, was then introduced, and testified, that he was one of said company that took up said slaves; that soon after said slaves were separated near said cabin, and were being examined, it was announced so that said slaves (including said Brister, Jeff, Cæsar, and John Rodgers) could hear it, that the boy Ned confessed; that said Pool then went to Cæser, and asked him what part he had taken in the murder. Cæsar then, by his counsel, objected to his confessions, made in answer to said question, being received in evidence: but the court overruled the said objection, and allowed said confessions to be received, and said defendant Cæsar excepted. Said Pool then testified, that in answer to said question, Cæsar confessed that a plot had been mentioned to him by John Wallace to kill the deceased, and that he had assented to it,—that he was in the house when the deceased was killed, but was asleep and had no hand in the killing,—and that after deceased was killed he had assisted in conveying him to the grave and burying him. To these con-

fessions, thus obtained, said defendant Cæsar objected, and moved the court to exclude the same from the jury; but the court overruled the objection, and allowed them to go in evidence to the jury; and defendant Cæsar excepted."

Said Pool further testified, that he asked each one of the other defendants separately the same question, viz., "What part did you take in the murder of the deceased?"—that Brister confessed "that John Wallace told him there was a plot to kill the deceased,—that he (Brister) assented to it,—that he was in the house when deceased was killed, but was asleep, and had no hand in the killing,—and that he had assisted in digging the grave for deceased"; that Jeff confessed, in answer to said question, "that John Wallace had told him there was a plot to kill the deceased,—that he assented to it,—that he was in the house when deceased was killed, but was asleep, and had no hand in the killing,—and that he helped to dig the grave"; that John Rodgers confessed "that John Wallace had told him there was a plot to kill the deceased, and that he had assented to it,—that he was in the house when deceased was killed, but was asleep, and had no hand in the killing,—and that he went with those who carried the deceased to the grave, but did nothing else." Brister, Jeff, and John Rodgers each made the same objections to the admission of their confessions that Cæsar had made, as above stated, and excepted to the ruling of the court in admitting them; the objections and exceptions of each one being expressed in the same language used in the case of Cæsar in the last paragraph.

"On cross-examination by defendants Brister, Cæsar, Jeff, and John Rodgers, said Pool stated, that in stating the confessions of said defendants he did not pretend to give their language, or that of any one of them—that he used his own language in testifying, and gave his best recollection of the substance of the language used by them; and thereupon said defendants again severally moved the court to exclude each of their confessions above mentioned from the jury, but the court overruled the several objections, and the defendants severally excepted. Said Pool, on cross-examination, further deposed, that in testifying to the confessions of said Brister, Cæsar, Jeff, and John, he stated the substance of all that he recollected each of said defendants said, according to his best

recollection, but that they may have said more, which he does not recollect; and thereupon said defendants again severally moved to exclude their said several confessions, so deposed to by said Pool, but the court severally overruled their motions, and defendants severally excepted. On re-examination said Pool testified, that he had testified to the substance of all that each of said defendants stated on that occasion, but that they may have stated something he did not recollect; that said Brister, Cæsar, Jeff, and John Rodgers all said, when they made said confessions, that they had nothing to do with killing said deceased, and that he was killed by George and Wash; that Jeff further said, he did not know when the deceased was killed; and that John Rodgers said he did not assist in killing him.

"There was evidence that, when said defendants were taken up, and after said confessions were made, defendants were required by the persons who had taken them up to point out the grave of deceased; and that the persons having them in charge made them turn their backs to the ditch, and took one at a time, and made each one put a mark on the place which each one severally pointed out as the place of the grave. A witness (Cunningham) testified, that on the morning after the day of the disappearance of the deceased, he went to the ditch where the negroes who had been in charge of the deceased were at work on the ditch, and found all the thirteen slaves which the deceased had had at work with him, except Archer, (including the prisoners,) and then asked the slaves present where Mr. Rickard was, (addressing the crowd, and no one in particular); that they hesitated in giving an answer, and looked at each other, and some one of them told witness to ask John Wallace where he was,—they supposed he could tell where he was. It was shown, also, that John Wallace was Rickard's foreman, and always had charge and control of said slaves in the absence of deceased. Said Cunningham further testified, that he did ask John Wallace, and he said that the deceased had gone to New Orleans. There was no evidence introduced to show that Wash struck the blow, or blows, that killed the deceased; and there was no testimony to show that Wash and George were parties to the plot to kill the deceased.

"The testimony in behalf of the State being closed, and before any testimony was introduced by the defendants, the following defendants, to-wit, Archer, Bill, and Jeff, offered to demur severally to the evidence introduced by the State against them severally; and the court, upon the ground that the court was not bound to take the responsibility of settling and passing upon the testimony, but that the jury should pass on the case, refused to allow said defendants to demur to the said evidence, and to this ruling of the court they severally excepted. The said defendants then severally insisted upon the court passing on their said demurrer to the evidence after all the testimony on both sides was closed; and the court again declined to dispose of said demurrers, on the ground that the jury should, in all cases, pass upon the testimony, and that the court, in such a case as this, was not bound to do so; and to this ruling of the court said defendants Archer, Bill, and Jeff severally excepted.

"The defendants Brister, Cæsar, Jeff, and John then proposed to introduce as a witness their co-defendant Archer, on the ground that there was no evidence against him to authorize him to be put upon his defence,—the only evidence against him being that he was on the place when the deceased was killed, and was seen at the cabin where the deceased was killed, on the morning after the night on which the killing took place, about daylight, and was one of the slaves at work with the deceased at the ditch for some days previous to the killing; and on the day the body was found, the said defendant Archer pointed out the grave, saying, that the place which he pointed out was where the other negroes told him they had buried the old man; and saying at the same time, that he had no knowledge of the killing, and had no hand or part in it. But the court overruled this motion, and said Cæsar, Brister, Jeff, and John Rodgers severally excepted. These defendants then moved the court (to) direct and allow the jury to return a verdict of acquittal as to their co-defendant Archer, on the ground that there was no sufficient evidence of his guilt to require him further to defend; which motion the court refused, and said defendants (Cæsar, Brister, Jeff, and John Rodgers) excepted.

"The defendants requested the court to charge the jury—

"1. That, if they believed the slaves John Wallace, George, and Wash killed the deceased, and that the accused worked with them from that time until they were taken up, and that there were others of said slaves who had not been charged with the murder of the deceased, and who knew where his grave was and pointed it out, and who also worked with the accused,—that these facts might account for the accused knowing where the grave was, because they might have been told where it was; which charge the court refused, and said Cæsar, Brister, Jeff, and John Rodgers severally excepted.

"2. That, if the jury cannot determine, beyond a reasonable doubt, that the confessions made by Brister, Cæsar, Jeff, and John Rodgers to Mr. Pool were made before Bill (one of the defendants) was whipped,—then they must exclude their confessions from their consideration entirely; which charge the court refused, and said Cæsar, Brister, Jeff, and John Rodgers severally excepted. The court, after refusing said charge, stated to the jury, that they might look to any other facts in the case to solve this doubt.

"3. That under the indictment in this case, if there was no evidence that the boy Wash struck the blow, or blows, the jury must find the defendants not guilty; which charge the court refused, and the defendants all severally excepted.

"4. That under the indictment in this case, if the jury cannot determine from the evidence whether John Wallace, George, or Wash struck the blow or blows which produced the death of the deceased, they must find the defendants not guilty; which charge the court refused, and the defendants Cæsar, Brister, Jeff, and John Rodgers severally excepted.

"5. That, if there was no evidence that Wash and George were parties to the plot to kill the deceased, and if they were satisfied from the testimony that Wash and George did kill the deceased, then they could not find the defendants guilty; which charge the court refused, and defendants severally excepted.

"The court charged the jury—

"1. That, if they found that Cunningham, on the morning after the deceased disappeared, went to the ditch, and inquired of the slaves there for the deceased, and they hesitated or failed to answer him that question, and that the prisoners

were present when the said question was asked,—they might take that as a circumstance tending to show their guilt; to which charge the defendants severally excepted.

"2. That the true test is, whether you believe the confessions true or not; and if you believe them to be true, the State must have the benefit of them as evidence. The defendants severally excepted to this charge.

"3. That they might believe one part of the confessions, and reject the other, and might look to all the circumstances connected with the case to ascertain whether the whole, or only a part, was true; and to this charge the defendants severally excepted.

"4. That, if they believed the defendants were present, and encouraged another to commit the murder, they were as guilty as if they struck the blow, and concealment of the crime, if they knew it had been committed, is a circumstance for the consideration of the jury as to their guilt; and to this charge the defendants severally excepted.

"After the jury had retired to consider their verdict, the defendants Brister, Cæsar, Jeff, and John Rodgers were remanded to jail, and while in jail the jury returned into court; and on being asked if they had agreed upon a verdict, replied through their foreman that they had. The court then directed the clerk to receive and read the verdict, and the clerk received and read it aloud accordingly, in the presence of the court and a large number of by-standers; the prisoners Brister, Cæsar, Jeff, and John Rodgers not being in court at the time, and being in jail. The court then observed to the jury, that they were discharged, and the jury started out of the court-room, but had not got out of the bar. It was then discovered that the prisoners were not in court, and the court immediately stated to the jury that they were not discharged; and ordered the clerk to hand the papers in the cause back to them, and directed the sheriff to bring the said prisoners into court. When the prisoners were brought into court, they objected to the clerk receiving the verdict of the jury, on the ground that the verdict had been received by the court and read aloud in their absence, and that they had been deprived of their right to have the jury polled. But the court overruled the objection, received said verdict, and ordered the

same to be read in the presence of the said prisoners; which was done accordingly, and said prisoners excepted."

The defendants Brister, Cæsar, Jeff, and John Rodgers then moved the court, 1st, to set aside the verdict of the jury; 2d, "that they be discharged, the verdict of the jury being received in their absence"; 3d, in arrest of judgment; and, 4th, for a new trial. In support of these several motions, they relied on the facts above stated in reference to the verdict being received in their absence, and also introduced evidence of the misconduct of some of the jury while considering their verdict, in separating from each other without the charge of an officer, and in conversing with other persons; but upon all the evidence, which it is unnecessary to state at length, the court overruled each motion, and the defendants severally excepted to each ruling of the court.

The jury returned a verdict of guilty against the defendants Cæsar, Brister, Jeff, and John Rodgers, and not guilty as to Bill and Archer; and the court thereupon pronounced sentence of death on the four first-named, but ordered the execution to be suspended until the decision of the Supreme Court could be had upon the points reserved by the bill of exceptions, all of which are now assigned for error.

I. W. GARROTT, with whom was J. R. JOHN, for the plaintiffs in error:

I. The Code, (§ 3576,) and also Clay's Digest, (p. 459, § 53,) require that a copy of the indictment shall be served on the prisoner, if in custody. In this case, it was served on the counsel, not of record, or the same who appeared for the defence at the trial, so far as the transcript discloses.

II. The confessions were obtained under circumstances, a bare recital of which is sufficient to show that they ought not to have been admitted. The defendants are slaves,—were on the plantation of S. F. Pool, without any white person near them to whom to look for protection,—were taken into custody by sixteen or seventeen white men, who went on the place armed with double-barreled guns, negro whips and sticks, and accompanied by a pack of negro dogs, known to be such by defendants. They were told what these white men had come for—viz., to find out what had become of the

old man Rickard; they were separated for examination, but kept in custody, and some of them were tied, and so near that each could see and hear what was done to the others; it was announced in their hearing that one had confessed, and then the witness approaches each one of the defendants and asks him, "What part did you take in the murder?" (thereby assuming his guilt). If to all this it be added, that it was proved or even left doubtful that one of the number was whipped before the confessions were made, it is too clear for argument that defendants confessed under the "torture of fear," or rather, under the fear of torture. It is not surprising that one of these unprotected slaves was so terrified at this formidable display of men and things most dreaded by them, that he actually "trembled"; and to hold that a confession drawn from this defendant, quaking with fear and agony at what he saw and heard, would be equivalent to holding that no amount of fear which could exist in the mind, should render confessions extracted under its influence illegal.—Wyatt v. The State, 25 Ala. 9; 1 Green. Ev., §§ 214, 219, 222, 225; 3 Ph. Ev., (C. & H. Notes), part 1, 429, note 259.

2. It was incumbent on the State to show that the confessions were voluntary,—not on the defendants to show that they were not. One witness testified that the whipping commenced before the confessions were made; another (a white person) that he could not say whether the whipping commenced before or after the confessions. This doubt, even under the circumstances, was sufficient to require the exclusion of these confessions.—Wyatt v. The State, *supra;* 1 Green. Ev. 219.

III. Confessions, like all other admissions, when attempted to be detailed, must be fully deposed to. Part cannot be given, and part not. The precise language used must be given, if possible; if not, then the substance of all that was said must be stated by the witness.—Davis v. The State, 17 Ala. 354, (357-8); Dennis & Strickland v. Chapman, 19 *ib.* 29; 1 Green. Evidence, §§ 218, 214; 3 Ph. Ev., (C. & H. Notes,) 425.

The testimony of Pool, as to the confessions, falls far short of this. He says, that he does not "pretend" to give the language of defendants, or the language of any one of them; that

"he stated the substance of all he recollected that each defendant said, according to his best recollection, but that they may have said more which he did not recollect" (p. 14-15). How vague! He does not pretend to use defendants' language, nor does he give the substance of all they said, but only the substance of all, or so much as he recollected. How much may he have forgotten! He himself admits that they may have said more than he detailed, and which he did not recollect. If such testimony is admissible, then the lives of men are dependent, not on what they may admit or confess, but on the imperfections and frailties of those who hear them, and who judge and pass on what they suppose to be the substance of what is said, and then detail so much of that as they happen to recollect.

IV. The defendants had a right, by demurring to the evidence, to withdraw their case from the jury, and throw themselves upon the judgment of the court. The constitutional right to be tried by a jury is secured to every citizen, and if a defendant is disposed to waive this right, the tribunal before which he is tried has no right to decline to pass on his case, and to force him before a jury by whom he is not willing to be tried, and who may be influenced by prejudices which are supposed never to reach the bench.

V. There was no evidence against Archer that could raise even a suspicion of his guilt, and under section 2288 of the Code, he ought to have been admitted as a witness.

VI. The circumstance that defendants pointed out the grave of deceased having been introduced against them, the defendants sought to explain by showing that they might have obtained their information from others with whom they had for some time associated and who had knowledge of these facts. But the court, by refusing the first charge asked for, in effect asserted that this knowledge of the accused could not be thus accounted for. This was wrong.—3 Ph. Ev., (C. & H. Notes), part 1, p. 417; The State v. Guild, 5 Hals. 188.

VII. As the court, on the preliminary examination, declined to exclude the confessions of defendants, then the question ought to have been referred to the jury, and the court should have charged them that, if they believed that the confessions were improperly obtained, they should disregard them.—The

State v. Guild, 5 Halstead, 188; 3 Ph. Ev., (C. & H. Notes,) part 1, p. 423-4, 429, 301; 5 Pick. 477, (496).

VIII. The indictment charges that defendants and others, including boy Wash, with a club-axe, which Wash then held in both his hands, killed deceased. There was (says the bill of exceptions,) no evidence to show that Wash struck the blow; and the court was asked, and refused to charge, that if this material averment in the indictment was not proved, that they must find defendants not guilty. That it is material, is shown in 1 Archb. Cr. Pl. 89, (2), note 2.

IX. There was no evidence (page 16) that Wash and George were parties to the plot to kill deceased. The plot, so far as the proof shows, was between John Wallace and defendants. The proof shows that Wash and George did the killing. The refusal of the court to give the last charge, therefore, asserted the preposterous position, that if defendants and John Wallace conspired to kill deceased, and afterwards Wash and George, having nothing to do with this plot, killed the deceased, then the defendants are guilty; in other words, if defendants and John Wallace conspired to kill deceased, but did not do it, and some other person with whom they had no connection did it, then defendants are as guilty as if they themselves had done the killing.

X. The first charge given at the instance of the State, (page 18,) cannot be sustained. The fact that Cunningham addressed a crowd of thirteen slaves, the defendants being among them, and that defendants, who do not seem to have been in part or in any way called on to answer, "hesitated," or failed to answer, surely ought not to be used against them. They had a foreman who was their spokesman, and it was natural that they should refer to him, as the proof shows they did, to answer the question.

XI. The last charge asked for is abstract and calculated to mislead the jury. There was no evidence to show that defendants were present, in legal sense, and encouraged the striking of the blow. The proof shows that most of them were asleep, where they were bound to be; and if asleep, they could not encourage the deed. Nor was there any evidence to show any act of concealment of the crime. The bare fact that one does not tell what he knows, cannot be held to make

him responsible for all acts of which he has information.

XII. The second charge given, at the instance of the State, is also erroneous,—because the true test as to confessions is not whether they are true or not, but whether properly obtained or not. If the position asserted in the charge be correct, confessions obtained on the rack would be admissible.

XIII. The dispersion of the jury vitiated their verdict.—People v. Douglas, 4 Cowen 26, (38); Smith v. Thompson, 1 *ib.* 221, note *a*, p. 235-6-7; Woods v. Hart, 3 Caines' R. 95; Dana v. Roberts, 1 Root's (Conn.) 134; Oliver v. Trustees of Presby. Ch. of Springfield, 5 Cowen 283.

2. The presumption is that injury results from the dispersion of the jury, and it must be shown affirmatively that injury did not result, or the verdict will be set aside.—McCann v. The State, 9 S. & M. 465, (467); Hines v. The State, 8 Humph. 597, (9 U. S. D. 343, §§ 21, 22); Boles v. The State, 13 S. & M. 398, 401-2; Durfee v. Eveland, 8 Barb. Sup. C. R. 46; Overbee v. Commonwealth, 1 Rob. (Va.) 756; 1 Archb. 178-19, (note), where the authorities are collated.

XIV. Verdict cannot be rendered in the absence of the prisoner.—The State v. Hughes, 2 Ala. 102; 2 Hawkins 619, § 2; Rex v. Landsingham, 1 Raym. 193.

XV. It is the duty of the court to keep the jury together, and if it fails, then it commits an error,—because it has not complied with what the law imposes as a duty. This is matter which can be reached by writ of error, apart from all considerations of motions in arrest of judgment, new trial, &c.

P. T. Sayre, for the Attorney General, *contra*:

1. After a change of venue, it was too late for the defendants to raise the objection that a copy of the indictment had not been served on them.—State v. Williams, 3 Stew. 463. This decision was made upon a statute clothed in the same language with that used in the Code.—Toulmin's Laws of Ala.; Aik. Digest. The action of the court will be presumed to have been regular.—Morris v. The State, 25 Ala. 59.

2. But the record shows that a copy was served on the defendants' counsel, and this is sufficient, for two reasons—1st, because such has been the general practice of the State, which the court will judicially recognize (Millard's Adm'r v. Hall,

24 Ala. 224); and, 2d, because the party is bound by the acts of his counsel: whatever is "done by him in the pendency of a cause, is considered as done by authority of his client, and is binding on him."—2 Md. Ch. Dec. 143; *ib.* 425; 13 U. S. Digest, p. 67, § 6; Lewis v. Sumner, 13 Metcalf's R. 269; Courcy v. Brenham, 1 La. Ann. R. 397; Flake & Freeman v. Day & Co., 22 Ala. 132; 4 Ired. Eq. 485; 3 Dev. 62; 6 How. (U. S.) 106; 3 Cranch, 297; 1 Burr. 59; 11 Ala. 820.

3. There was no error in allowing to each defendant his peremptory challenges.—Hawkins v. The State, 9 Ala. 141; Bixbe v. The State, 6 Ohio R. 86.

4. It was a matter of discretion with the court, whether or not to direct an acquittal as to Archer; and its action cannot be reviewed on error.—The State v. McLendon, 5 Strobh. 87; 2 U. S. Digest, p. 533, § 347; Code, §§ 3594–5.

5. It is conceded, that a defendant, in a capital case, has the right to be present when the verdict is rendered; but in this case, the defendants had the substantial benefit of that right. The mere fact that the jury handed the verdict to the clerk, by whom it was read aloud in the absence of the prisoners, did not injuriously affect them, if by such action they lost no right which then existed. The record shows that the irregularity was discovered before the actual dispersal of the jury; and that the jury was immediately recalled, and the verdict rendered in the presence of the prisoners. The order dismissing the jury was a judicial act which could be set aside so long as the jury remained within the control of the court. But, even if the action of the court was erroneous, the prisoners were not on that account entitled to their discharge. The State v. Hughes, 2 Ala. 102; The State v. Battle, 7 *ib.* 259.

6. The court properly refused to allow the defendants to demur to the evidence. In all the prosecutions by indictment or information, the constitution (Art. I, §§ 10, 28) is mandatory that the trial shall be by jury. These defendants could only be tried by indictment, and an indictment can only be found by a grand jury. It is plain that a party could not, by appearing in court, admitting his guilt, and waiving the indictment, subject himself to punishment; because the constitution is imperative, that an indictment shall first be found,

to give the court jurisdiction; and after the indictment is found, it is equally imperative as to the mode of trial. If the indictment, then, cannot be waived, no reason is perceived why a waiver of trial by jury could be made.—Doss v. Commonwealth, 1 Gratt. 557.

7. The rule as to confessions, whether made by white persons or by slaves, is the same:—Clarissa v. The State, 11 Ala. 62. That they are slaves, and ignorant, are facts for the consideration of the jury in weighing the testimony.—Seaborn and Jim v. The State, 20 Ala. 18. The confessions must be freely and voluntarily made, and uninfluenced by promises or threats; and they are sometimes rejected, when made in response to a question which assumes the party's guilt. But the mere fact that the parties are in custody, will not exclude confessions:—Seaborn and Jim v. The State, 20 Ala. 18; Wyatt v. The State, 25 *ib.* 12; Spence v. The State, 17 *ib.* 197; Carroll v. The State, 23 *ib.* 28. The negroes in this case, it is true, were all arrested, by men who were armed; but no threats or promises were made: on the contrary, it was announced in the presence of the negroes, that they need not be alarmed,—that the party had only come to find out what had become of Rickard. The only hypothesis, upon which the confessions can possibly be excluded, is, that they were made after the boy Bill had been whipped. This fact, however, must affirmatively appear. One witness swears, that according to his best recollection, they were made after the whipping; while another witness is unable to remember which occurred first; and the bill of exceptions says, "there was some conflict of testimony" on that point. The rule is, that the bill of exceptions must be construed most strongly against the party excepting; and it is evident from the language here used, that there was other evidence on that point not set out in the record. For the purpose, then, of sustaining the judgment of the court, it will be intended that there was evidence sufficient upon which to predicate the ruling of the court. The question propounded by the witness Pool to each one of the prisoners, did not assume the guilt of the party addressed: it was tantamount to asking whether he had taken any part in the murder. All the other cases decided in this State, in which confessions have been ruled out on the

ground that they were made in answer to questions assuming guilt, were based on the fact that the question assumed guilt affirmatively, and on the principle that the slave could not deny the assertion of the master.—Clarissa v. The State, 11 Ala. 62. In this case, no guilt is assumed, but the party is left to make such answer as his feelings might prompt. The case of Clarissa is not regarded as authoritative, and the true rule is laid down in Carroll's case, 23 Ala. 28.

RICE, J.—The indictment is for a capital offence, and was found in the Circuit Court of Perry, against the plaintiffs in error and divers other slaves. The trial of the plaintiffs in error, on their application, was removed to the Circuit Court of Bibb, under the provisions of sections 3608 to 3616 inclusive of the Code. These plaintiffs have been in actual confinement ever since the indictment was found. When they were brought into the Circuit Court of Bibb for trial, they objected to going to trial, "on the ground that a copy of the indictment had not been served on them or their counsel two entire days before the trial." But it being shown to the court that a copy of the copy of the indictment set out in the transcript sent up by the clerk of the Circuit Court of Perry was delivered by the clerk of the Circuit Court of Bibb to the counsel of the plaintiffs in error at the preceding term of the Circuit Court of Bibb, the court overruled the objection, and the plaintiffs in error excepted.

If the ground of objection had been, that a copy of the indictment had not been delivered to them two entire days before the trial, and no other proof of delivery had been adduced than that above shown, we should, without hesitation, have reversed the judgment; for the right is conferred, by section 3576 of the Code, upon every person indicted for a capital offence, if he is in actual confinement, to have a copy of the indictment delivered to *him* at least two entire days before the day appointed for his trial.—The United States v. Curtis, 4 Mason's Rep. 232; Smith's Com. on Stat., pp. 685-6. But our duties as a court for the correction of errors committed by inferior tribunals are defined by law, and confine our examination to the action of the court below upon the objection as there made. We cannot allow to the prisoners the benefit

of an objection they did not make below, and of which they deprived themselves by the objection which they did make.

The rule is, that we can indulge no presumption adverse to the correctness of the action of the primary court, but must make all intendments in its favor not inconsistent with the record.—Morris v. The State, 25 Ala. 57. We cannot, therefore, know or say that the court below would not have sustained the objection, if the ground of objection had been that a copy of the indictment had not been delivered to the prisoners two entire days before the trial. The form in which the ground of objection was stated—"that a copy of the indictment had not been served *on them or their counsel* two entire days before the trial"—was treated by the court below as a waiver of the right of the prisoners to have a copy delivered to them, if a copy had been served on their counsel two entire days before the trial; and therefore, on proof being made to the court that a copy had been delivered to their counsel by the clerk more than two days before the trial, the court overruled the objection *as made by the prisoners*. We cannot decide that the court erred in this. *Non constat*, the State might have proved a delivery of a copy to the prisoners themselves, more than two days before the trial, if the objection had been put on the ground that a copy had not so been delivered to them. They relieved the State from the necessity of making such proof, by placing their objection on the ground selected by themselves.—93d Maxim in Law Grammar, p. 76.

When the trial of such a case as this is removed, as this was, section 3615 of the Code provides, that the prisoners "must be tried on the copy of the indictment", certified in the manner directed by section 3613. In such case, the copy so certified becomes so far an original, in the court to which the trial is removed, that a copy of such copy when delivered to the prisoners will have all the effect that a delivery of a copy of the actual original could have.

2. The transcript furnished by the clerk of the Circuit Court of Perry in this case, to the Circuit Court of Bibb, duly certifies a copy of the caption of the grand jury, the indictment, with the endorsements thereon, and all entries relating thereto, and the order for the removal of the trial, and

all other orders in the cause, as required by section 3613 of the Code. There was no error in overruling the objection made by the prisoners to going to trial before the Circuit Court of Bibb on said transcript.

3. In Hawkins v. The State, 9 Ala. 137, it was decided, that if there is a joint indictment, and joint trial of several persons, each may challenge the whole number of jurors to which he would be entitled if tried separately; and that no man ought to sit as a juror, upon a joint trial, who was not, in the estimation of all the prisoners, indifferent as to all. This decision is sustained by high authority, and is fully approved by us. There is, therefore, no error in the rulings of the court below as to the challenge of jurors.

4. It has been long settled in England, that in a criminal prosecution, the crown officer is not bound to join in a demurrer to evidence tendered by the defendant.—1 Chitty's Crim. Law 623 (mar. page). The right of a prisoner to compel the State to join in a demurrer to evidence is not given by the common law, or by statute, or by the constitution; and we hold, (as the General Court of Virginia has heretofore held,) that neither the State nor the party accused can be permitted, except by mutual consent, to withdraw, by a demurrer to evidence, the trial of the cause from the jury to the court. Doss v. The Commonwealth, 1 Gratt. R. 557.

5. Where the court commits an error by admitting evidence, which, at the time of its admission, was not admissible, such error is cured, if the record affirmatively shows that the evidence so admitted became admissible by reason of other testimony subsequently introduced.—Lawson v. The State, 20 Ala. 65. This principle disposes of the several exceptions taken by the prisoners during their cross-examination of the witness Pool,—provided the confessions of the prisoners (if proved literally) do not appear to us to have been inadmissible confessions; which is a matter we shall examine as soon as we add a few words relating to the exceptions last above named.

The record shows, that, "on re-examination, said Pool testified, that he had testified to the substance of all that each of said defendants stated on that occasion, but that they may have stated something that he did not recollect." This was as much as the law exacted, to entitle him as a witness to

testify to any voluntary and admissible confessions of the prisoners; and all the exceptions taken to the testimony of Pool are unavailing to the prisoners, unless the record shows us that the confessions of the prisoners are such as the law rejects.

6. We now proceed to the consideration of the important subject of confessions. We shall treat it with becoming caution, and shall confine ourselves as much as possible to the language used by what we deem the highest and best authorities on the subject.

In the first place, we shall state the general rules which should govern the judge in deciding upon the competency—the admissibility of confessions.

Before any confession can be received in evidence, in a criminal case, it must be shown that it was voluntary—that is, that it was made without the appliances of hope or fear, by any other person. Whether it was so made or not, it is for the judge (before he admits it) to determine, upon consideration of the age, condition, situation and character of the prisoner, and the circumstances under which it was made. The material inquiry is, whether the confession has been obtained by the influence of hope or fear, applied by a third person to the prisoner's mind.—1 Greenl. Ev., § 219; Wyatt v. The State, 25 Ala. 9; Spence v. The State, 17 *ib.* 197; Seaborn and Jim v. The State, 20 *ib.* 15.

But all the foregoing must be taken subject to the qualification necessarily implied from the existence of a certain other well-settled rule, in substance as follows: Although, by the flattery of hope, or by the torture of fear, information has been obtained from the prisoner, yet, if *in consequence of such information so obtained from him, the body of the person murdered*, or any other material fact, *is discovered*, it is competent to show that such discovery was made conformably with the information given by the prisoner, and to show that he stated that the thing would be found at a particular place, and to prove that it was accordingly so found; for the statement as to his knowledge of the place where the body or other evidence was to be found, being thus confirmed by the fact, is proved not to have been *fabricated* in consequence of *any inducement or influence*. And this coincidence between his statement and

the thing discovered is a matter which the law will not withhold from a jury. This rule, and its limitation, will be found in 1 Greenl. Ev., § 231; see, also, 2 Phil. Ev. 249, note 226; 2 Russ. on Crimes, (ed. 1853,) pp. 862-3.

Where promises or threats have been used, yet, if it appear to the satisfaction of the judge that *their influence was totally done away* before the confession was made, the evidence will be received.—1 Greenl. Ev., § 221.

In the next place, we shall state the rules which should govern the parties and the jury after confessions have been admitted by the judge.

Whenever a confession is admitted by the court, the jury must take it: they cannot reject it as *incompetent*: they are confined to its *credibility* and *effect*.

Either party has the right to prove *to the jury* the same facts and circumstances which were legally proved to the court when it was called upon to decide the question of competency, and all other circumstances applicable to the confession or having any legal bearing on its credibility or effect; and if, in view of all the facts and circumstances proved, the jury entertain a reasonable doubt as to the truth of the confession, they may disregard it, in their decision of the case, as being *incredible*, although they cannot reject it as *incompetent*. The Commonwealth v. Dillon, 4 Dallas 116; Commonwealth v. Knapp, 10 Pick. 477-496; State v. Guild, 5 Halst. 163; 2 Phil. Ev. 235-240, notes 205 and 207. If they entertain no such reasonable doubt, they ought not to disregard it, although they may believe it was obtained by the appliances of hope or fear to the mind of the prisoner.

The rules above laid down recognize the sphere of the judge and the sphere of the jury as distinct; and, whilst they prevent the jury from invading the province of the judge, they alike prevent him from invading their province. These rules, also, preserve the great safeguard thrown around every person charged with crime—the right to claim at the hands of a jury the benefit of every reasonable doubt arising from the evidence.

7. A majority of the court are of opinion, that the confessions in this case, under the previous decisions of this court, were improperly received, and that the motion to exclude

them from the jury, which says, "to these confessions, thus obtained, the prisoners objected, and moved to exclude", &c., must be considered as referring to the preceding proof showing the manner in which the confessions were obtained. They are of opinion, that, although the bill of exceptions fails to set forth all the proof, yet it shows that the decision of the court was predicated upon that which is set out; and as enough proof is set out to put the court in error, if there was other proof, it was the duty of the court to set itself right by setting it out.

In my opinion, the prisoners having objected to the confessions, as being elicited by a question assuming their guilt, viz., "What part did you take in the murder?" and this objection having been overruled, and the confessions admitted in evidence, the objection and motion to exclude immediately following—namely, "to these confessions, thus obtained," &c.,—refers to their being obtained as previously stated by the preceding objection—that is, in answer to what the counsel supposed to be an improper question assuming their guilt. I think the bill of exceptions fairly admits of this construction, and as it sustains the judgment, (Carroll v. The State, 23 Ala. 28,) numerous decisions of this court require that we should so construe it. I do not think enough is shown in the record to put the court below in error.

8. In this connection, it is proper to say, that it follows from the rules above stated, that there was no error in the second charge given by the court, nor in refusing the second charge asked by the prisoners. If this second charge asked had been given, the jury would have been thereby forced to "*exclude* their confessions from their consideration *entirely*", although they were convinced beyond a reasonable doubt that the confessions were *true*,—merely because they could not determine beyond a reasonable doubt that the confessions were made before the slave Bill was whipped.

9. There was some evidence against the slave Archer, who was put upon his trial with the plaintiffs in error. The jury might have believed that part which tended to fix guilt upon him, and have disbelieved that part which tended to exculpate him. There was no error in overruling the several motions of the prisoners, which were made for the purpose of

enabling them to use their co-defendant Archer as a witness for them.—Code, § 3594.

10. The bill of exceptions fails to show that there was any one of the thirteen slaves who were living and working with deceased when he was killed, who had not been charged with his murder; and it also fails to show that any of said thirteen slaves, except the plaintiffs in error and Archer, knew where the grave of the deceased was and had pointed it out. The first charge asked by the prisoners assumes that there was evidence of these facts. There was no error in refusing that charge, for it was abstract, and not authorized by the evidence. Waters v. Spencer, 22 Ala. 460; Brooks v. Hildreth, *ib.* 469; Swallow v. The State, *ib.* 20; Carey v. Hughes, 17 *ib.* 388.

11. If the indictment charges that A gave the mortal blow, and that B and C were present, aiding and abetting, &c., but on the evidence it appears that B struck, and that A and C were present, aiding and abetting, &c., this is not a material variance; for the stroke is adjudged in law to be the stroke of every one of them, and is as strongly the act of the others as if they all had held the weapon, and had all together struck the deceased.—2 Russ. on Crimes, (ed. 1853,) pp. 793-4; 2 Hale's P. C. 292. Therefore, there was no error in refusing the third, fourth, and fifth charges asked by the prisoners.—Rex v. MacAlly, 9 Rep. 67; Sauchar's case, *ib.* 119 a.

The fifth charge asked is liable to another insuperable objection: it assumes it to be law, that although the prisoners may have been parties to the plot to kill the deceased, and although they may have been present, aiding and abetting and encouraging Wash and George in the murder, yet, if Wash and George did the killing, and were not parties to the plot, the prisoners must be totally exonerated from the guilt of the murder, merely because Wash and George were not *parties to the plot.*

12. We have carefully examined the first, third and fourth charges given by the court, and are satisfied there was no error in giving them.—See the authorities above cited; and Johnson v. The State, 17 Ala. 618; Campbell v. The State, 23 *ib.* 28; Smith v. The State, 9 *ib.* 990.

13. The rule of law is undoubted, that one tried for a crime has a right to be present when the jury return their verdict

against him. But the reason—the only reason—of this rule is, that he may examine them by the poll, to ascertain if they assent to his conviction.—The State v. Hughes, 2 Ala. 102. When it is clear that the reason of this rule has been fully satisfied, the rule itself is satisfied. When the jury returned with their verdict in this case, and announced that they had agreed, the prisoners were not in court, but in jail. But the court, not knowing this, directed the clerk to receive and read the verdict, and the clerk did read it aloud in the presence of the court and a large number of bystanders. The court then observed to the jury, that they were discharged, and the jury started out of the court-room, but had not got out of the bar. It was then discovered, that the prisoners were not in court, and the court immediately stated to the jury, they were not discharged, and ordered the clerk to hand the papers in the cause back to them, and directed the sheriff to bring the prisoners into court. When the prisoners were brought into court, they objected to the court's receiving the verdict of the jury, on the ground that the verdict had been received by the court and read aloud in their absence, and that they had been deprived of their right to have the jury polled; but the court overruled the objection, received said verdict, and ordered the same to read in the presence of the said prisoners; which was done accordingly, and said prisoners excepted."

Upon these facts, we hold that the jury were not discharged, in legal contemplation, by the occurrences which transpired in the absence of the prisoners. The observation of the court to the jury, that they were discharged, was revocable by the court for a time, and was revoked in due time. The revocation was in time, because it was almost instantaneous and whilst the jury, *as a body*, were still continuing to be in the bar, and in the presence and power of the court. This revocation being in time, we think the court had the power to return the papers in the cause to the jury, and to do what it then proceeded to do. Such a course of proceeding did not deprive the prisoners of the right nor the opportunity to examine the jury by the poll. There is nothing sound in the argument that the right to poll was prejudiced by the fact that the verdict had been previously read aloud in court; for

the right to poll the jury cannot be exercised in any case until the verdict has been read aloud in court.—2 Hale's P. C. 299-300.

14. The improper conduct of a jury, after they have retired to make up a verdict, is not a ground for a motion in arrest of judgment.—McCann v. The State, 9 Sm. & Mar. 465; 1 Waterman's Archb. Cr. Pl. 178–31, and note (2).

15. Misconduct of a jury is a ground for motion for a new trial.—Wharton's Cr. Law 895; Waterman's Archb. Cr. Pl. 178–19. But it is too firmly settled in this State now to be questioned, that this court cannot revise the action of the Circuit Court refusing a new trial.

We have carefully deliberated upon every question presented by the record, and the result is, that while I think the judgment and sentence should be affirmed, my brethren believe there is error in admitting the confessions; and for that error the judgment and sentence pronounced in the court below must be reversed, and the cause remanded.

Ex parte ROWLAND.

1. *Mandamus* from the Supreme Court does not lie to compel the chancellor to dismiss a cause, on motion, in pursuance of a written agreement between the parties to that effect.

Application for a *mandamus* to the Chancery Court of Perry. Hon. James B. Clark, presiding.

The petitioner (John S. Rowland) alleges that he filed a bill in equity, in April, 1853, against one Samuel Whitman, for the settlement of certain partnership accounts; that after the defendant had answered, and had also filed a cross bill, a written agreement was entered into between them, "that the said original bill, cross bill, and answer, and all the claims set up in the same, should be totally abandoned by the parties, as though they had never existed,—each party

paying his own costs"; that Whitman, at the next term of the court, moved to set aside this agreement, on the ground of fraud, and filed affidavits in support of his motion, and at the same term petitioner moved the court to dismiss the cause in pursuance of said agreement; and at the next term of the court, both these motions were overruled and refused,—with leave to petitioner to move to modify the injunction, and without prejudice to Whitman's right to proceed by supplemental bill (or otherwise) to have said agreement vacated. And on these facts the petitioner now asks for a rule *nisi* against the chancellor, to show cause why a peremptory *mandamus* should not issue from this court, to compel him to dismiss said cause in pursuance of said written agreement.

I. W. GARROTT, for the motion, to show that *mandamus* was the proper remedy, cited Stephenson v. Mansony, 4 Ala. 320; Mallory v. Mattock, 7 *ib.* 757; same case, 10 *ib.* 597; Tarver v. Commissioners' Court of Talladega, 17 *ib.* 527; Tapping on Mandamus (67 Law Lib.), top p. 58-9.

JOS. R. JOHN, *contra*, contended that this was not a proper case for a *mandamus*, and cited the following authorities: Board of Police of Attala Co. v. Grant, 9 Sm. & M. 88; *Ex parte* Milner, 6 Eng. Law and Eq. Rep. 373; The People v. Judges of Duchess C. P., 20 Wend. 658; *Ex parte* Elston, 25 Ala. 72; *Ex parte* Henry, 24 *ib.* 638; *Ex parte* City Council of Montgomery, *ib.* 98.

PER CURIAM.—Motion refused, on the authority of *Ex parte* Elston, 25 Ala. 72; *Ex parte* Small, *ib.* 74; *Ex parte* City Council of Montgomery, 24 *ib.* 98, and cases cited.

McCAULEY *vs.* THE STATE.

1. A lawyer's office, though a "public house" within the statute against gaming, (Code, § 3243,) is not a "public place."
2. The constitutional guaranty of a trial by jury, "in all criminal prosecutions," includes the right to have the deliberations of the jury continued, when once they have begun the trial and heard any evidence, until the occurrence of a sufficient legal reason for their discharge, and the chance of a verdict of acquittal at their hands during all that time; and therefore the unauthorized discharge of a jury in any criminal case, either for a misdemeanor or a felony, is equivalent to an acquittal. (CHILTON, C. J., expressing no opinion.)
3. But, since the court has power to discharge the jury in cases of necessity, or when the prisoner consents to it, a plea of a previous withdrawal of the cause from the jury after issue joined, "without the consent of defendant, and against his objection", is defective on demurrer: it should also negative the existence of any necessity for such withdrawal.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. ALEX. B. CLITHERALL.

THE appellant, with Bird Ivey, William T. Hawkins, William H. Davis, Joseph May, and Robert O. Bealle, was indicted, at the Spring term, 1854, of the Circuit Court of Pickens, for gaming. He filed a special plea to the indictment, in which he avers, "in short by consent, that at the present term of this court he was charged upon this identical indictment, for the identical offence charged therein, and for which he is now put on trial, together with one William T. Hawkins and one Joseph May, and that for his plea to said indictment he said he was not guilty, and issue was thereupon joined by the State of Alabama, and said cause was put to a jury of twelve good and lawful men in said Circuit Court, duly elected, empanneled, and sworn to try said issue so joined as aforesaid; and Alfred E. Van Hoose, Esqr., the solicitor who prosecuted said cause on behalf of the State of Alabama, proceeded to examine a witness to prove the issue on the part of the State of Alabama; and after said cause had been put to said jury, so elected as aforesaid, upon the issue joined as aforesaid, and after the solicitor aforesaid had proceeded to examine a witness to prove said cause on behalf of

the State as aforesaid, the honorable the Circuit Court of said county, without the consent of this defendant, and against his objection, on motion of said solicitor, granted him leave to sever the trial of the parties who had jointly put in the plea of not guilty to the charge in said indictment, and withdrew the cause as to this defendant from the jury to whom, as aforesaid, the same had been submitted for trial; all of which this defendant is ready to verify by the record."

The court sustained a demurrer to this special plea, and the defendant then pleaded not guilty; on which plea issue having been joined, a trial was had, and the defendant found guilty and convicted. From the bill of exceptions it appears, "that the evidence showed that the defendant played a game with cards, in the office of Z. L. Nabors, a practicing attorney, in the town of Carrollton in said county, which is the county site; that the office is on the same lot with the said lawyer's dwelling-house; it fronts on the street,—the enclosure of the dwelling-house running to the front corner of said office; a young man, a minor who was in the employ of said lawyer in his printing office, which is disconnected with said office, sleeps in it; that the game played by McCauley was in the night-time, by the consent of the young man, who did not engage in the game; that the application for leave came from McCauley, or from some one in his company; that the playing commenced about nine o'clock at night, when the doors were locked and the curtains of the windows drawn, so that the inmates could not be seen from the outside; that the number engaged in the playing were four or five, and there was no person present who did not engage in the playing, except the minor above mentioned. It was in evidence, also, that on several occasions before this time, applications had been made to the young man for leave to play cards in this office, which he granted; that he had no permission from his employer (the said lawyer) to permit gaming in said office, but, on the contrary, his employer had expressly forbidden him; but whether this was before or after the playing he could not tell. It was also in evidence, that there had been playing in said office on a Sunday; but there was no proof connecting defendant with it.

"Upon this evidence, the court charged the jury, that, if

they believed the evidence, the defendant was guilty of playing cards in a public place, within the purview of the statute; to which charge the defendant excepted."

No errors are assigned on the record.

S. F. HALE, for the appellant:

1. After a criminal cause has been submitted to the jury, and some evidence offered by the State, a withdrawal of the case from the jury, unless for some of the causes allowed by the statute, operates as an acquittal, and the prisoner cannot be again put upon his trial for the same offence.—Mount v. The State, 14 Ohio 295; The People v. Barrett & Ward, 2 Caines' R. 304; The State v. McKee, 1 Bail. 651; Commonwealth v. Cook, 6 Serg. & R. 577. The cases referred to by the Attorney General are not in point: the Virginia case (7 Gratt. 667) was on a statute; and the New Jersey case (4 Halst. 257) was one of necessity, as one of the jury had escaped.

2. The charge was erroneous.—Burdine v. The State, 25 Ala. 60.

M. A. BALDWIN, Attorney General, and P. T. SAYRE, *contra:*

If the court suffers a case to be withdrawn from the jury after some evidence has been submitted to them, this does not entitle the defendant to a discharge under that indictment. Dye v. Commonwealth, 7 Gratt. 667; Hall v. The State, 4 Halst. 257; The People v. Ellis, 15 Wend. 371; The People v. Denton, 2 John. Cas. 271; The People v. Olcott, 1 *ib.* 301; 8 Cowen's R. 127; 9 Leigh's R. 614; Mahala v. The State, 10 Yerg. 535; The State v. Brooks, 3 Humph. 70; The State v. Morrison, 3 Dev. & Bat. 115.

RICE, J.—Upon the authority of the case of Windham et. al. v. The State, decided at the present term, we must hold the charge of the court to be erroneous; for, although the office where the playing occurred is a "public house", it is not "a public place", within the meaning of section 3243 of the Code.

As the cause must be remanded for the error above noticed, it is proper that we should express our opinion upon the important questions which are connected with the matter stated

in the special plea, to which a demurrer was sustained. The first of these questions is, whether there can be, in this State, any such thing as the unauthorized discharge of a jury, in the case of a *misdemeanor*. If there is, the next question will be, whether such discharge is equivalent to an acquittal. And if that be so, the remaining question will be, whether the facts stated in said special plea establish such discharge.

No such questions have heretofore been presented to, or decided by this court, in the case of a *misdemeanor*.

In Ned v. The State, 7 Porter's R. 187, (a capital case,) our predecessors, upon a review of the leading English and American authorities, decided (among other things), that courts have not, in capital cases, a discretionary authority to discharge a jury, after evidence given; that a court does possess the power to discharge a jury, in any case of pressing necessity; that, although the judge determines the existence of the facts, yet, when they are ascertained, the law determines whether they constitute a case of necessity; and that the unauthorized discharge of a jury is equally as fatal to any subsequent trial, as an acquittal or conviction.

In Cobia v. The State, 16 Ala. 781, (an indictment for murder,) this court held, that the discharge of the jury, before verdict rendered, "must be understood to mean *a legal discharge*", and that the result of the authorities was, "that if the prisoner be put on his trial upon a sufficient indictment, and the evidence in support of the charge is submitted to the jury, the court cannot *arbitrarily interfere and arrest the trial by discharging the jury;* and if the court should discharge the jury before they deliver their verdict, without *a sufficient legal reason* for doing it, the prisoner shall never be tried again."

Every decision of this kind rests upon this solid ground:— that such decision is essential to preserve inviolate to the prisoner *the right of trial by jury*, as guaranteed by the constitution. This right cannot mean less than a right to have the deliberations of the jury, when once they have begun the trial and heard any evidence, continued until the occurrence of a sufficient legal reason for their discharge, and the right to have, during the entire period of such continuance, the chance of a verdict of acquittal at the hands of that jury. It is impossible for any judge to say, that the jury would not

have acquitted him. It is equally impossible for any judge to say, he can get another jury who will acquit him. The law does say, if any jury ever does acquit him, their verdict shall not be set aside by any court, however unwarranted by the law and the evidence in the case that verdict may be. The chance of a verdict of acquittal, at the hands of *each jury* to whom the cause and any evidence have been submitted, is obviously important to a prisoner, and is clearly embraced in the guaranty of trial by jury. To deprive the prisoner of this chance, by the lawless act of the court in discharging the jury, is a flagrant wrong, for which there is no remedy, except to treat such deprivation as equivalent to an acquittal. To hold that there is no remedy for such a wrong, is to hold that the right of trial by jury has ceased to be a right; for if, by such lawless act of the court, one jury may be discharged, an indefinite number may be discharged in the same manner.

That the ground above stated is the unassailable ground upon which the decisions above cited must rest, is evident from the fact, that whilst they hold that the unauthorized discharge of a jury before they render a verdict will protect the prisoner against a subsequent trial as fully as a verdict of acquittal, they also hold, that if the prisoner has been actually convicted, and the judgment has been reversed, or a new trial granted, at his instance, he may be tried again. The principle which reconciles these two positions, thus maintained in these decisions, may be thus stated: The constitutional guaranty of trial by jury is broken by the lawless discharge of a jury after they hear some evidence and before they render a verdict; but, where a trial is actually had, and a verdict of guilty rendered, that guaranty is not broken by mere errors committed on that trial, for the correction of which a remedy is provided by law. If the prisoner has not been lawlessly deprived of his chance of a verdict of acquittal, by an unauthorized discharge of a jury, but has had a trial by jury and been found guilty,—in that case, although errors may have been committed by the court on the trial, to his prejudice, he has his remedy whereby he can procure from a revising court the correction of such errors—the reversal of the conviction, and another chance for a verdict of acquittal on a subsequent trial. If, however, the prisoner has been deprived of his

chance of a verdict of acquittal by a jury who have begun his trial and heard some evidence, by the lawless discharge of that jury, there is no remedy anywhere for this lawless discharge, except to treat it as equivalent to an acquittal. To withhold the only remedy in such a case, is to surrender to the lawless discretion of the judge the constitutional right of trial by jury.

We concede, that before a jury is empanneled to try a criminal case, the court has the discretionary power to sever the trial or continue the case; "but," as the Supreme Court of Massachusetts have well said, "when a jury is empanneled for the trial of an indictment, the defendant *then acquires new rights*, which the court will protect." "When once put on his trial, and a jury sworn for that purpose, it is *his right to have them pass upon his case.* Their verdict will be a bar to another indictment for the same offence: a *nolle prosequi* will not. *He is entitled to this bar.* The Attorney General, finding his evidence insufficient, might discontinue for the purpose of commencing another prosecution, and then subjecting the defendant to *another trial. This the law will not permit.* In *this stage* of the proceedings, a *nolle prosequi* cannot be entered without the consent of the defendant."—Commonwealth v. Tuck, 20 Pick. 356; see, also, Mount v. The State, 14 Ohio 295.

"It is a well understood maxim of our law", say the Supreme Court of Tennessee, "that the judges are to expound the law, and the jury to ascertain the facts, neither of which has the power to interfere with the province of the other. The jury, in their deliberations upon the facts, are as independent of the court, as the judge, in determining the law, is of the jury; and the consequence is, that *when a case has been submitted to a jury*, there it must remain until it has been decided by them, or is withdrawn from their consideration, *not at the will and pleasure of the court, but under circumstances justified by law.*"—Mahala v. The State, 10 Yerg. 235.

The cases of Mahala v. The State, *supra*, and of Ned v. The State, 7 Port. 187, contain such a review of the authorities, and so correct an exposition of the law, on the subject under consideration, as to relieve us from the citation of any great array of authorities.

The earliest American cases upon the subject of the power

of the court to discharge a jury without a verdict, in cases of *misdemeanors*, which we have been able to find, are The People v. Denton, 2 Johns. Cases 275, and The People v. Olcott, *ib.* 301. In both these cases, *the necessity* for a discharge of the jury is one of the grounds of decision. It is the only defensible ground; for the other ground of decision was the bald assumption, that the power of courts to discharge a jury, in cases of *misdemeanors*, is analogous to their power in *civil cases*, and rests in discretion.

Both these decisions were made in 1801, and whilst the justly distinguished Judge Kent was a member of the Supreme Court of New York. He concurred in the first case, and delivered the opinion in the last. He continued to be a member of the same court until 1805, when the same question, in the case of a *misdemeanor*, again came before that court, in the case of The People v. Barrett, 2 Caines' Rep. 305; and notwithstanding Judge Kent and that court had apparently been committed by the cases above cited from 2 Johnson's Cases, he and the whole court decided, that the discharge of a jury, in a case of *misdemeanor*, "merely because there be not testimony sufficient to convict, with a view to another trial, falls within the reason of none of the authorities", and entitled the prisoner to his discharge; and the prisoner was discharged accordingly.

But notwithstanding this signal and practical repudiation by that very able court of the doctrine "that the power of courts to discharge a jury, in cases of *misdemeanors*, is analogous to their power in *civil cases*, and rests in discretion,"—the error of its promulgation was not entirely cured thereby: for some judges have followed that error and adopted it on the authority of the case of The People v. Olcott, without noticing or seeming to be aware that it was practically repudiated by the same court in The People v. Barrett, 2 Caines' Rep. 305. Other judges have adopted the same error, without giving any reason for it.

We think it is a great mistake, to assert that the common law made no substantial distinction between the power of a court to discharge a jury in a *civil case*, and its power to discharge a jury in the case of a *misdemeanor*. It is universally conceded, that Sir William Blackstone was thoroughly ac-

quainted with the common law. The distinction between trial by jury in *civil cases*, and trial by jury in *criminal cases*, is very clearly stated in his Commentaries. He says; "The trial by jury is that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter. * * The antiquity and excellence of this trial, for the settling of *civil property*, has before been explained at large. And it will hold *much stronger in criminal cases;* since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of the judges appointed by the crown, in suits *between the king and the subject*, than in disputes *between one individual and another*, to settle the metes and boundaries of private property. Our law has, therefore, wisely placed this strong and *twofold barrier* of a *presentment* and *a trial by jury* between the *liberties of the people* and the *prerogative of the crown*."—4 Bl. Com. 349.

He also says: "In many instances where, contrary to evidence, the jury found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the Court of King's Bench; but there hath yet been *no instance* of granting a new trial where the prisoner was *acquitted* on the first." 4 Bl. Com. 361. In The King v. Mawbey, 6 Term Rep. 639, the doctrine that "defendants who have been *acquitted* in criminal cases cannot be tried a second time", was stated, and not denied or questioned. In that case, Lord Kenyon, C. J., asserted that, in offences greater than misdemeanors, it had been held, no new trial could be granted, even in favor of a prisoner who had been convicted, but that in misdemeanors, a new trial could be granted in favor of "those who have been *convicted*." In the same case, Lawrence, J., said, "Arguments drawn from *civil cases* are not applicable to *the present*."

In 1 Chitty's Crown Law 657, it is laid down, that "a new trial cannot, in general, be granted in favor of the prosecutor, after the defendant has been *acquitted*, whether on an indictment for a *misdemeanor* or a felony, even though the verdict appears to be against evidence, or was upon the misdirection of the judge."

The common law, as to the power to grant new trials, as stated in the foregoing extracts from Blackstone and Chitty, has ever been recognized as part of our law; and consequently,

no new trial has ever been granted, or can be granted in this State, in any criminal case, where the defendant has once been acquitted.

In a civil case, the court may, at its pleasure, and without liability to revision, set aside a verdict, whether for the plaintiff or the defendant, and grant a new trial: and it is because the court possesses this unlimited discretion to grant a new trial in a civil case, that it may, in such a case, before verdict, arrest the trial, and order the cause to be tried by another jury.—*Ex parte* Edward Henry, 24 Ala. 638.

Our law allows an equal number of challenges to each party in a civil case; in the case of a misdemeanor, six challenges are allowed to the prisoner, but only four to the State. In a civil case, the verdict ought to be rendered for that party in whose favor there may be a mere preponderance of the evidence; but in the case of a misdemeanor, although there may be a preponderance of the evidence for the State, the jury ought not to find against the prisoner unless they are satisfied beyond a reasonable doubt of his guilt.—State v. Murphy, 6 Ala. 845; State v. Newman, 7 *ib.* 69. An appeal is allowed to either party in a civil case, from the final judgment; but no appeal or writ of error is allowed to the State, from a judgment rendered on a verdict of acquittal in the case of a misdemeanor, although the prisoner, if convicted, is entitled to a writ of error.

As our law ever has made, and still makes, such a broad distinction between a civil case and a case of misdemeanor, we ought not to recognize as authority any decision which is founded upon the assumption that there is no distinction, in these two classes of cases, as to the power of the court to discharge a jury before verdict rendered. The unavoidable effect of such decisions would be, to arm the judges of the primary courts with a tremendous power to oppress the citizen, and to place the *improper* exercise of this terrific power beyond the "superintendence and control" of the Supreme Court, and of the laws and constitution of the State.

Our constitution guaranties the right of *trial* by jury "in *all* criminal prosecutions" (for misdemeanors, as well as for capital offences). This right must remain inviolate. New and arbitrary methods of arresting trials, in criminal cases, even in misdemeanors, cannot be tolerated. "These inroads

upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern."—4 Bl. Com. 350.

Our opinion is, that, in this State, any discharge of a jury, which would protect a person indicted for a capital offence from a subsequent trial, will work the same result in favor of a person indicted for a misdemeanor; that, in this respect, there is no middle ground—no difference between a capital case and a case of misdemeanor, as the constitution guaranties the right of trial by jury "in *all* criminal prosecutions"; that any unauthorized discharge of a jury, in any criminal case, is equivalent to an acquittal; that the court possesses the power to discharge a jury in cases of necessity, or when the prisoner consents to it, but in no other cases; that the discharge of a jury without the consent of the prisoner, and without a necessity for the discharge, is unauthorized; that the sudden illness of a juror, or of the prisoner, so that the trial cannot proceed, are ascertained cases of necessity, and serve as examples to show what the law means by a case of necessity.

We come now to the last question for our consideration—that is, whether the special plea is good. "Although it is a general rule, that the *allegata* and *probata* must correspond, and that a party need not allege more than he is bound to prove, yet the rule is not of universal application: sometimes a party is required to negative the existence of a fact, the *onus* of proving which rests upon his adversary." Thus, when the surety sets up as a defence an extension of the time of payment given by the creditor to his principal, the surety must *aver* that the indulgence was given without his consent. Carpenter v. Devon, 6 Ala. 718. So, when a prisoner pleads that a jury was discharged by the court, after the trial had begun, he must not only aver that such discharge was without his consent, but he must go further, and aver that such discharge was without any necessity. The plea in this case does not negative the existence of any necessity for the discharge of the jury; and for this omission in the plea, it is bad, and there was no error in sustaining the demurrer to it. In all other respects, the plea is sufficient.

After several defendants are put on their trial before the same jury, the court cannot allow a severance, and withdraw the case as to one of the defendants from that jury, without his consent, unless there existed at the time such a necessity as would have authorized the court to discharge the jury, as to that defendant, without his consent, and without a severance. Such withdrawal of the case of one defendant from the jury is a virtual discharge of the jury as to him whose case is so withdrawn, and its legality must be determined alone by the rules which determine the legality of any other discharge of a jury in a criminal case.

If the special plea is amended by inserting in it an additional averment negativing the existence of any necessity for the withdrawal of the case from the jury, it will then be a good plea.

For the error in the charge of the court below, above referred to, its judgment is reversed, and the cause remanded.

CHILTON, C. J.—I agree in the result—to-wit, that the playing was not at a public place, and that the plea, failing to negative the idea that the judge, in ordering the severance, acted within the scope of his legal discretion, was properly held bad on demurrer. As to the power of the court in withdrawing causes from a jury, and whether this power is the same in respect of felonies and cases of mere misdemeanor, I desire to be considered as expressing no opinion, since in my judgment these questions are not raised upon the present record.

Ex parte VINCENT (a slave).

1. A two-storied house of which the front room on the first floor was used as a store-house, and the back room (which also contained a few boxes of goods, and communicated with the front by a door in the partition) as a sleeping room by the owner, while his clerks, who were unmarried men and took their meals at a hotel, slept in the rooms on the second floor,—*held* a dwelling-house, both within the common-law definition of burglary, and under sections 3308-9 of the Code.
2. When words are used in a statute which, when used in reference to the

same subject, have obtained a fixed and definite meaning at common law, the inference is that they were intended to be used in their common-law sense.

3. The term "dwelling-house," as used in section 3308 of the Code, has the same meaning as in the definition of burglary at common law; and the following section (3309) was intended to soften the rigor of the old statute (Clay's Digest, p. 472, § 4), by narrowing the meaning of the term, in requiring that there should be a white person in the house at the time the offence was committed, and that the building should be joined to and parcel of the dwelling-house.

APPLICATION for the writ of *habeas corpus*, or other appropriate process, to obtain the petitioner's discharge from custody in the county jail of Talladega under a charge of burglary.

The petitioner alleges, that he is a slave, the property of Hon. Samuel F. Rice; that he was arrested, on the 28th of December, 1854, by a constable of said county, under a warrant from a justice of the peace, which was issued on the affidavit of one Samuel Adler that petitioner "did, on or about the 2d day of December, commit the crime of burglary, or break open a store-house the property of said Adler"; that the said justice, after hearing all the evidence adduced before him, committed petitioner to the county jail, as standing "charged with the crime of burglary"; that he afterwards made application to the Hon. A. J. Walker, Chancellor of the Northern Chancery Division of the State, to be discharged from custody upon *habeas corpus*, but the said chancellor, after hearing the evidence, remanded the petitioner to jail; that petitioner, by his counsel, excepted to the ruling of the chancellor in refusing to discharge him, and at his request the chancellor signed and sealed a bill of exceptions, which shows what proceedings were had before him, and which is prayed to be taken as a part of his present petition. This bill of exceptions, as copied into the transcript appended to the petition, is as follows:

"The prisoner, by his counsel, for the purposes of a trial before me, admitted that he did, some four or five weeks ago, a short time before the trial had before the justice of the peace, break into the front room of the house, on the square in the town of Talladega, known as "Adler's store", in the night-time, and took therefrom goods. It was proved, that Samuel Adler and his brother, at the time the house was so broken into, were sleeping in the back room of the said store-house, and

two or three young gentlemen (clerks in the store of Samuel Adler) were sleeping above stairs in the said house; that said house was divided below into two rooms by a partition; that these two rooms were connected together by a door in the partition; that in the front room, which was upon the square in the said town, the said Adler had, at the time said house was broken into, opened a stock of goods, which he was selling at retail, and that in the back room below there were some boxes of shoes, put there in consequence of want of room in the front room; that said Adler and his brother, and the said clerks, were at the said store, engaged in selling goods, and carrying on the trade of retail merchants; that they were so engaged at the time said house was broken into, and some time both before and since, and that they slept there; that Samuel Adler slept in a bed in the back room below, and the clerks above stairs; that they always slept with the door open in the partition between the two rooms, and it was open when the house was broken into; that the said Adlers and their clerks ate at the hotel in said town, except on Sunday mornings, when their meals were usually sent to them from said hotel; that their washing was not done at the said house; that the goods were taken from the front room; that all the said persons were unmarried men; that said house was called in the town, and known, as "Adler's store-house," and that Samuel Adler himself called it his store; that on the trial of said slave two justices of the peace presided, and that they were requested by said slave, through his counsel, to call in the probate judge, and summon a jury, and try the case upon its merits, which they refused to do, and committed said slave to jail to answer an indictment to be preferred at the next term of the Circuit Court of Talladega; that the said Samuel Adler, in the affidavit made to procure a warrant for the arrest of said slave, called the said house 'a store-house.' The witnesses said, that they had not heard said house called a dwelling-house except on this trial. These were all the facts before me as chancellor; and the said slave thereupon, through his counsel, moved for his discharge. I refused to discharge him from imprisonment, and remanded him to jail; and the said slave, by his counsel, excepted."

In the petition presented to this court, it is also alleged

that, "in addition to the evidence set out in said bill of exceptions, there was evidence tending to show that petitioner did not break and enter said store-house."

MORGAN & MARTIN, for the prisoner:

This application is made upon the authority of the following cases: *Ex parte* Edward Stiff, 18 Ala. 464; *Ex parte* Croom & May, 19 *ib.* 561. The question presented is, whether the petitioner is legally imprisoned, and is to be held to answer an indictment to be preferred at the next term of the Talladega Circuit Court, for the offence prescribed in section 3308 of the Code; or, whether the facts, if the evidence is sufficient to convict, do not show that he committed the offence prescribed by section 3310. If the evidence shows that he is guilty under the latter section, it was the duty of the justice before whom he was tried and committed, to have associated with himself the judge of probate and another justice, and put the prisoner upon his trial as required by section 3316. This the justice was requested to do, but refused, and committed the prisoner to answer a charge of burglary.

We may concede, that the facts here shown would have amounted to burglary at the common law.—1 Russ. on Cr., p. 784. Our penitentiary code, as found in Clay's Digest, adopts the common law, by simply declaring that "every person who shall commit the crime of burglary," &c.—p. 426, § 64. And in reference to slaves, it also declared that "every slave who shall commit the crime of burglary," &c.—p. 472, § 4. The Code, however, changes the law on that subject as to white persons, and defines specifically what shall amount to burglary in this State.—Code, § 3183. There is, then, in this State, no such crime as burglary as it existed at the common law: the definitions are wholly different, and the punishment is different, even as to white persons. From this the inference is clear, that the Legislature was not satisfied with the law as it was found in our old statute and at common law.—Rutland v. Mindon, 1 Pick. 154. So far, then, as slaves are concerned, there is no such offence as burglary of which they can be guilty.

It is contended, however, that the defendant is guilty of the specific statutory offence defined by section 3308 of the Code:

The term "dwelling-house", in the definition of burglary at common law, has a technical meaning, including adjoining houses, out-houses used in connection with the dwelling, and all other houses within the curtilage; but it is clear that such is not the strict, literal, or popular meaning of the term.—1 Hayw. 242. The main question here, then, is, In what sense is the term used in this section of the Code? We insist, that it must receive a strict, literal, and popular construction—that it was used in the sense in which it is commonly understood in the community; because, 1st, such is the well-established rule in the construction of all statutes,—a rule founded upon the common sense of justice to those who are to be governed by the law.—Favers v. Glass, 22 Ala. 624; 1 Kent's Com. 461; 9 Pick. 285; 7 Mass. 523; 1 Selden's R. 9. Hence, in the interpretation of ancient statutes, the safest mode is to go back and ascertain in what sense the language in which they are clothed was understood at the time of their adoption.—Smith on Statutes, p. 630, § 482. The great desideratum is, to arrive at the intention of the law-maker; and, as it is to be presumed that he addressed himself to those who were to be governed by the laws, in language which they would understand, there is no safer mode of arriving at that intention than by ascertaining the meaning given to the language by the people themselves.—*Ib.* §§ 488, 747, 748. The bare mention of a "dwelling-house" suggests to every mind a house mainly and expressly (not incidentally) intended for the residence of a family—a house withdrawn from the active bustle of business; a house where the curtains of privacy and retirement are drawn around its inmates, who there instinctively feel a security afforded by no other situation in life; a house, too, which we approach with a kind of innate reverence and respect. It does not mean a law-office, in which a young man may happen to sleep; nor a stable, which may be occupied at night by an ostler; nor a regular retail store, on the public square in a village, in the back room of which a clerk may happen to sleep, and to which the public are invited and solicited to come day and night.

Statutes are not to receive a technical construction, unless it is plainly intended by the Legislature.—8 Pick. 370; *ib.* 514; 4 Mass. 471. Modern statutes, even in civil cases, are

to be construed strictly.—Bradley v. Clarke, 5 Durn. & E. 106. Penal statutes are to receive a strict interpretation, in favor of the defendant; general words must be restrained in his favor; because it is better that the courts should fail to punish where the law-makers intended punishment, than that the courts should punish where the law-makers had not intended that it should be done.—Smith on Statutes, pp. 854 to 857; 8 Pick. 370, 514; 4 Mass. 471. And where there is a doubt as to the construction of a statute, it will never be so construed as to create a felony, or to increase the punishment. 3 Mass. 254; 17 *ib.* 360; 5 Pick. 420.

Again; the Code must be treated as an entire act, and its several parts be construed *in pari materia*. Every part of a statute must be looked to, in construing any portion of it. 9 Bac. Abr. 239; 4 Gill. & John. 152. Construing the Code thus, it will be found that the offence committed here is fully and entirely covered by a succeeding section (3310). The term "other building", as here used, evidently includes "store-house", and excludes "dwelling-house"; and if the defendant had been proceeded against under this section, he could not have defended on the ground that the proof showed him to be guilty under section 3308. The offences prescribed in these two sections are wholly different; the punishments are different; the courts which try the offender are different. One offence is not included in the other.—7 Mass. 523; 8 Pick. 370. If a store-house had been specifically mentioned in section 3310, it is evident that the proof here would not warrant a conviction under an indictment for breaking and entering a dwelling-house; and yet a store-house would not then have been more clearly included, than it now is under the term "any other building."—Bush v. The State, 18 Ala. 415; Mills v. The State, 20 *ib.* 86. The Code was intended to introduce a system of statute laws, plain and simple in their character, divested of all technicalities, and speaking what they mean; and such has been the course of construction.—Alabama & Tennessee River Railroad Co. v. Harris, 25 Ala.

The construction for which we contend is reasonable and just, while the opposite is unreasonable and unjust; and when this is the case, the presumption is in favor of the former.—Commonwealth v. Kimball, 24 Pick. 366.

M. A. BALDWIN, Attorney General, *contra*:

1. The question is, Was the store-house a dwelling-house, within the meaning of sections 3308-9? Burglary, as defined by those sections of the Code, does not alter the common-law requirements to constitute that offence, except in this: there must be some white person in such house at the time the offence is committed, and the building must be joined to, and part and parcel of the dwelling-house.

2. The term dwelling-house has a technical meaning, and not that meaning which is attached to it in the common acceptation. Every house for the dwelling or habitation of man is taken to be a dwelling-house, in which burglary may be committed. It is not necessary that a family, or any particular number of persons, lodge in or inhabit the house. Every house in which a man usually sleeps is considered a dwelling by the common law.—3 Humph. 379; 1 Hayw. 242; 1 Hale's P. C. 557; 1 Leach 396; 1 N. & McC. 583; 1 Hawk. ch. 19, § 18, pp. 133-4-5; 4 Black. Com. 225-6; 2 East 496; 2 Leach 931. The definition of a dwelling-house in defining the crime of arson (in section 3186) is the correct one—to-wit, "Any house, prison, or other building which is occupied by a person lodged therein at night."

GOLDTHWAITE, J.—The building broken into was a house of two stories, in which one Adler kept goods for sale. The house below was divided into two rooms, communicating by a door in the partition which divided them. The goods were in the front room, which was used for carrying on the business, and the back room contained a few boxes of shoes, and at and before the time of the breaking was used as a sleeping room by Adler. The second story was slept in by the clerks of the store, and the proof was, that they were all single men, and took their meals at a hotel in town, except on Sunday, when their breakfasts were usually sent to them; and that their washing was done away from the house. The only question upon these facts is, whether the house was a dwelling-house within the meaning of section 3308 of the Code.

At the common law, any house was a dwelling or mansion, in a burglarious sense, in which any person resided, or dwelt;

and with reference to the offence which could only be committed in the night, we think the true test is, whether it was permanently used by the occupier, or any member of his family, as a place to sleep in. Thus, if neither the owner, nor any member of his family, slept in the house, it is not his dwelling-house, though he had used it for his meals and all the purposes of his business.—Rex v. Martin, R. & R. 108. So burglary may be committed in a lodging room (1 Leach 89); or in a garret used for a workshop and rented together with an apartment for sleeping (1 Leach 237). So to break and enter a shop not parcel of the mansion house, in which the shop-keeper never lodges, but only works or trades there in the day-time, is not burglary, but only larceny; but if he, or his servant, usually or often lodge in the house at night, it is then a mansion house in which burglary can be committed.—1 Hale P. C. 557-8. Indeed, it is obvious that there could, in general, be no other tests than the one we have mentioned as to single persons, as they could not properly be said to live or dwell in any house in which they did not sleep; and if the house which was permanently used by them for that purpose was not their dwelling-house, they could have none. We have no doubt, that at the common law, upon the facts as stated, the building must be regarded as the dwelling-house of Adler.

But it is said, that the term dwelling-house, in section 3308 of the Code, is not used in the same sense in which that term is used at the common law with reference to the offence of burglary. It must be remembered that, at the common law, the crime of breaking into a dwelling-house in the night-time, with the intent to steal or commit a felony, was called burglary (2 East's P. C. 492-3); and in view of the mischief to which the crime relates, we have seen that the term "dwelling-house" received a technical signification, differing in some respects from its popular meaning. By the old law (Clay's Dig. 472, § 4), this offence, when committed by a slave, was punished with death. By the Code (§ 3308) it is provided, that "every slave who breaks into and enters a dwelling-house in the night, with the intention to steal or commit a felony, must on conviction suffer death"; and by the following section (3309), that "no building must be deemed a dwell-

ing-house, or any part thereof, unless some white person is in such house at the time the act is done, or the offence committed; and no building which is not joined to and parcel of such dwelling-house must be considered as included in the preceding section."

If section 3308 stood alone, we should give to the term precisely the same meaning which it bears in burglary proper, for the reason, that the statutory offence would differ in no material respect from the common-law crime. The same words are used that are found in the definition of burglary as given by the text-books; and when words are used by the Legislature in relation to a matter or subject which, when used in reference to the same subject at the common law, have obtained a fixed and definite meaning, the inference, we think, is irresistible, that they were intended to be used in their common-law sense. It would be a strange thing, if the legal sense of "breaking into a dwelling-house in the night-time", meant one thing by the statute, and another by the common law.

If we had, however, any doubt upon the question, it would be dispelled by section 3309. At the common law, not only the dwelling-house proper, but all other buildings within the curtilage, or some common fence, were deemed part thereof (2 East's P. C. 492-3): and consequently a barn, stable, kitchen, or smoke-house, although separated from the main building, might be part of the dwelling-house within the meaning of burglary. But it is evident that neither of these buildings would, in such case, be a dwelling-house in the popular acceptation of that term; and on the supposition that it was used in that sense in the preceding section, why should the Legislature say it should not apply to certain cases to which it could not apply if used in its popular sense only? The meaning of the two sections, taken together, is obvious. The old law, which punished capitally every case of burglary when committed by a slave, was regarded as too severe, and, in order to soften its rigor, the meaning of the dwelling-house under the former law was narrowed. It was required that there should be a white person in the house at the time when the act was committed, and also that the building must be actually joined to and parcel of the dwelling-house. Subject

to these qualifications, we must construe the term referred to in section 3308 as meaning the same as that term in burglary at the common law.

Motion refused.

RICE, J., not sitting.

McGEHEE *vs.* THE STATE.

1. Under an indictment for resisting process, if the time of the commission of the offence is shown by the indictment itself to have been after the return day of the process, it is fatally defective on error.

ERROR to the Circuit Court of St. Clair.

Tried before the Hon. EDMUND W. PETTUS.

THOMAS J. McGEHEE, the plaintiff in error, was indicted at the Spring term, 1852, of the Circuit Court of St. Clair, for resisting process in the hands of a constable. The offence was charged to have been committed on the first day of March, 1852; while the process, which is set out in the indictment, was returnable on the tenth day of January, 1852, before the justice of the peace who had issued it. Having been found guilty by the verdict of a jury, the defendant moved in arrest of judgment, "because the indictment does not charge any offence against him; but defendant not being in court, the motion was overruled, and defendant's counsel excepted."

B. T. POPE, for the plaintiff in error.

M. A. BALDWIN, Attorney General, *contra*.

CHILTON, C. J.—The indictment is fatally defective, the alleged resistance being charged to have been committed after the process had spent its force and was *functus officio*.

Judgment reversed, and cause remanded.

DARLING JONES *vs.* THE STATE.

1. Under an indictment for gaming, the defendant may be convicted on proof "that he and another each put up money and threw dice for it, by placing the dice in a box and throwing three times each, the one throwing the highest number taking the money"; although it is also shown "that the mode of procedure and of throwing the dice was the same as in the case of raffling for property."

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. GEO. D. SHORTRIDGE.

ALEX. B. CLITHERALL, for the appellant.

M. A. BALDWIN, Attorney General, *contra.*

CHILTON, C. J.—The defendant was indicted for gaming at one of the places prohibited by law. It was proved, "that he and another, within twelve months before the finding of the indictment, at a store-house for the retailing of spirituous liquors in the county of Pickens, each put up money, and threw dice for it, by placing the dice in a box and throwing three times each,—the one throwing the highest number taking the money. It was shown, that the mode of procedure and of throwing the dice was the same as in the case of raffling for property." The court charged, that if the jury believed the evidence, the defendant was guilty; and such is our opinion. It was a game played with dice in the strictest sense of the term, and, although conducted upon the principles of a raffle, it was not the latter. A raffle, it is true, is a game usually played with dice; but in this, property or something of value is put up as the thing to be raffled for, the owner receiving the value in the sale of chances. Here the parties bet money upon throwing the dice, which money is to be won by the party throwing the highest number. Why the Legislature should virtually license by taxing the one, and condemn the other, is a question which addresses itself to the Legislature and not to the courts.

Judgment affirmed.

Ex parte GIST.

1. The thirty-third section of the judiciary act of 1789, (U. S. Statutes at Large, vol. i, p. 91,) which empowers justices of the peace and other officers therein named to arrest and commit (or bail, as the case may require) persons charged with a violation of the criminal law of the United States, is not unconstitutional: the authority thus conferred on justices of the peace is not "judicial power" within the third article of the Federal constitution, nor does the exercise of it make them Federal officers within the second clause of the second section of the second article.

Application for the writs of *habeas corpus* and *certiorari* to bring before this court (with the body of the petitioner) certain proceedings had before the Hon. A. J. Walker, chancellor, &c., on the petition of Jerome B. Gist to obtain his discharge from confinement in the county jail of Madison. The petition averred that the prisoner was arrested by the United States marshal of the Northern District of Alabama, under a warrant issued to him by a justice of the peace in Madison county, upon the affidavit of the postmaster at Huntsville charging said Gist with having robbed the United States mail; and the ground of the application was, that the justice had no authority to act in the premises. The chancellor refused to discharge the prisoner, who now petitions this court for relief.

Robert C. Brickell, for the petitioner:

The power conferred by the 33d section of the "judiciary act" upon justices of the peace, is, to arrest, imprison, or bail, as the case may require, persons charged with a violation of the criminal law of the United States. The power thus conferred is judicial, as contra-distinguished from ministerial. The mere arrest may be ministerial; but the imprisonment, or holding to bail, is judicial. Under this act, the justice must inquire whether a crime or offence against the United States has been committed,—whether there is reasonable ground to believe that the person charged committed the offence; and must then determine whether the offender shall be bailed, and, if bailed, in what sum. To determine these matters, he must hear evidence; and hearing evidence includes the power to

determine what is admissible, and what inadmissible evidence. The exercise of these powers, no matter on whom devolved, is the exercise of judicial power. In 1 Salk. 199, it is said, "Whenever a power is given to examine, hear, and punish, it is a judicial power, and they in whom it is reposed act as judges." "A public officer, lawfully appointed to decide litigated questions of law, is a judge."—1 Bouv. Law Dic., p. 724. This court, in Butler v. Foster, 14 Ala. 325, say, that the authority to admit to bail cannot be delegated, "because a judicial officer cannot delegate to another the powers and authority entrusted to him."

If the power be judicial, it is a part of the judicial power of the United States. This cannot be controverted. It is the law of the United States that has been violated; that law creates the offence, affixes the penalty, and provides the mode of arrest, trial, and conviction. No such offence is known to any other law. The law is designed for the protection of a department of the United States Government—a department exclusively under the control of that Government. Then, if the power exercised be a part of the judicial power of the United States, the inquiry is, Can Congress confer any part of the judicial power of the United States on State tribunals? The constitution provides, that the judicial power of the United States shall be vested in one Supreme Court and such other inferior courts as Congress may, from time to time, ordain and establish. This clause of the constitution has undergone a judicial construction, in Martin v. Hunter, 1 Wheat. 323; in which Mr. Justice Story holds, that it is the duty of Congress to vest the whole judicial power of the United States in courts established by itself. On page 328, he propounds this inquiry: "How otherwise could crimes against the United States be tried and punished?" On page 336, he says: "No part of the criminal jurisdiction of the United States can be delegated to State tribunals"; and on page 330, he says: "Congress is bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States." The test of this exclusive jurisdiction is shown on a subsequent page (335) to be this: "Had the State courts, before the adoption of the constitution, jurisdiction? and does the case arise un-

der the constitution, laws, and treaties of the United States? If the case arises under the constitution, laws, and treaties of the United States, and the State courts had not jurisdiction prior to the adoption of the constitution, they have it not now, and it cannot be conferred on them by Congress." In this case, the State courts, prior to the adoption of the constitution, had not jurisdiction of the offence charged against the petitioner: it is impossible that they could have possessed such jurisdiction, because the offence itself did not then exist; it is created by a law passed pursuant to, and in execution of, a power delegated by that constitution to the General Government; it is a consequence of a department established by that Government, and designed for its protection. In the case of United States v. Lathrop, 17 Johns. 4, C. J. Spencer holds, that State courts have no jurisdiction of criminal offences against the United States, nor of the penal law of the United States; nor can jurisdiction be conferred upon them by Congress. That case was a suit instituted to recover a penalty given by an act of Congress, which authorized suits therefor in the State courts. A similar decision was made in Ely v. Peck, 7 Conn. 239.

The precise question here presented arose in Almeida's case, before Justices Hanson and Bland, in Maryland, in 1817; their opinions may be found in the 12th vol. Niles' Register, pp. 114, 231. In that case, the petitioner was discharged, because his arrest and commitment by a State magistrate, for an offence against the United States, were unwarranted by law. Subsequently, Judge Cheves decided the case of *Ex parte* Rhodes; holding, that the arrest and commitment under similar circumstances were legal. His opinion, which will be found in 12th vol. Niles' Register, p. 264, is rested on two grounds, viz., that the duty performed by the justice of the peace is not judicial; and that he, as a judge of a State court, could not take cognizance of the case. The argument is, that justices of the peace were originally mere conservators of the peace, and that the power which they exercise under the act of Congress is merely incipient and ancillary to the judicial powers of the United States. In determining whether a particular power is judicial or ministerial, it is immaterial to inquire on whom it is conferred, or the character of the officer

by whom it is to be exercised: it is the duty to be performed, and not the character of the officer performing it, that fixes the distinguishing character of the duty itself. If an inquiry into the character of the officer performing the duty is material, is it not apparent from the character of the officers upon whom this duty is devolved, concurrently with the justices of the peace, that the duty is judicial? By the act, this duty is to be performed "by any justice or judge of the United States, or by any justice of the peace." Did Congress intend to degrade its judicial functionaries into mere ministerial officers of the courts over which they preside? But, says the judge, the power to be exercised is only incipient and ancillary to the judicial power. Concede this to be true, and it does not alter the case. The importance of the duty is not the question. What is that duty? and how is it to be performed? are the inquiries. A man may exercise judicial power, in determining litigation involving one dollar, equally with him who determines litigation involving one thousand dollars. The function he is required to perform is, to hear, weigh, and determine the effect of evidence. If so, then his power—his duty—is judicial, not ministerial.

Suppose we concede that the justice acts ministerially; how does that affect the question? Of what power is he the ministerial officer? Certainly not of the State of Alabama. Then he must be the ministerial officer of the General Government. An office is a charge or trust conferred by public authority.—7 Porter 371. Bacon and Bouvier define an office to be, a public function or employment; and whoever exercises this function or employment by legal authority, with the right to take the emoluments appertaining thereto, is an officer. If he be an officer, Congress had not the authority to appoint him. By the constitution, the President has the authority, by and with the advice and consent of the Senate, to appoint "all officers of the United States whose appointments are not herein otherwise provided for; but Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments." It has been held by the Supreme Court, that a clerk of the District Court is an inferior officer, within the meaning of the constitution.—*Ex parte*

Hennen, 13 Peters 230. In the case of Amer. Ins. Co. v. Canter, 1 Peters 511, it is held, that territorial courts are no courts, within the meaning of the constitution, in which the judicial power conferred by the constitution can be vested. Thus, we see, that if the justice be a ministerial officer, Congress cannot appoint him.

Is the petitioner entitled to the writ of *habeas corpus*? He is, unless the justice of the peace had the power to commit him to jail; and this is the inquiry on the writ of *habeas corpus*.—Cable v. Cooper, 15 Johns. 156; Spalding v. People, 7 Hill 30. Nor is it any objection that the case arises under the laws of the United States. If those laws authorize the prisoner's detention, the court will declare that detention legal; if they do not authorize his detention, then a pretence of authority from those laws is no better than any other pretence.—State v. Dimmick, 12 N. H. 196. The State courts have concurrent jurisdiction with the courts of the United States in all such cases.—7 Barr 336; 11 Mass. 63 to 83; 24 Pick. 227; 7 Cowen 471.

The attention of the court is particularly requested to the article on page 377 of the 12th vol. Niles' Register, entitled "National Question," which is an able review by Judge Bland of Judge Cheves' opinion in the case of Rhodes *Ex parte*.

Justices of the peace have no jurisdiction, except such as is conferred on them by statute.—Bridge v. Ford, 4 Mass. 641. Our decisions, in effect, assert the same principle.—Williams v. Hinton, 1 Ala. 297. The Code, specifying the powers of a justice (§ 712), concludes thus: "To exercise such powers as are or may be conferred on him by law." Section 3378 confers the power on them to issue warrants of arrest. The opinion expressed by Chancellor Kent, that it is the law and usage of nations to deliver up persons charged with felony, or any other high crime, to the sovereignty whose law has been violated, is not sustained by authority, and has not been followed by other courts of this country.—2 Brock. 493; 10 Serg. & R. 123; 2 Caines' R. 212; 12 Verm. 631; 14 Peters' R. 540; 2 Sum. 482; 14 Johns. 340.

But, even if the principle asserted by Chancellor Kent be correct, and applicable to the case, the petitioner is neverthe-

less entitled to his discharge. A "reasonable time" has been afforded "for the foreign government to make the requisite application to the proper authorities for his surrender"; a term of the court, at which, if guilty, he should have been indicted, has passed; no court was held; no step was taken to surrender him, nor to expedite his release from imprisonment. For more than six months he has been restrained of his liberty, awaiting the action of those charged with his prosecution. No principle of comity can require his further imprisonment.

CHILTON, C. J.—The petitioner was committed to jail, and detained under a warrant of commitment for robbing the United States mail, issued by a justice of the peace of Madison county, in conformity to the 33d section of the act of Congress, approved 24th September, 1789—1 Stat. at Large 91, § 33.

It is not denied that Congress may constitutionally pass the law for the violation of which the prisoner stands committed; but it is insisted for the petitioner, that the 33d section of the judiciary act confers *judicial power* upon a *State officer*, in violation of section 1, article III, and the second clause of section 2, article II, of the Federal constitution.

We concede, that the power or authority conferred by this section of the judiciary act is in its nature judicial. The justice of the peace is called upon to exercise judgment and discretion: he is to judge of the sufficiency of the affidavit on which the warrant of arrest is founded; he must determine, upon the evidence adduced against the prisoner, whether there is a reasonable ground of suspicion against him, so as to require that he should be put upon trial for the offence; and he is to imprison, or take bail for the appearance of the party at court to abide his trial.

But, although such authority involves in its exercise judicial functions, we are very clear it does not fall within the meaning of "*judicial power*," in the sense in which that term is used in the third article of the constitution.

In the distribution of powers possessed by the Federal Government upon three separate bodies of magistracy, the constitution deals in general language. All its legislative powers are vested in Congress,—the executive powers in the

President,—and "the judicial power shall be vested in one *Supreme Court*, and in such *inferior courts* as the Congress may from time to time ordain and establish."

It is manifest, we think, that by the term "judicial power" is here meant that power with which the *courts* are to be clothed for the purpose of the *trial* and *determining* of causes. The *judges* of these *courts* are to hold their offices during good behavior; and this "judicial power" is to extend to all "*cases*", in law and equity, arising under the constitution, &c. It was not intended by the general terms here employed to deny to the other departments the exercise of powers in their nature judicial, if essential to render the powers expressly delegated to them effectual. Hence it is, that Congress, having the power to organize the Postoffice Department, and to provide for the punishment of offenders against the laws enacted for the protection of the mail, have, as a further necessary incident, the power to provide for the arrest and safe-keeping of such offenders, until, by the exercise of the judicial power proper, on the part of the courts having jurisdiction of such cases, they are indicted and tried for the crime. So, also, although the President is the executive officer of the Government, he is constantly called on in the discharge of his duties to perform acts in their nature official. The same may be said of the heads of the respective departments of the Government.

We, however, deem it unnecessary to enter at length upon the discussion of the constitutional question, whether Congress may not, as a necessary and proper means for the accomplishment of an end clearly within the scope of its legitimate power, enact laws conferring powers judicial in their nature upon State magistrates. This right has been recognized by every department of the Government ever since the adoption of the Federal constitution,—has received, on more occasions than one, the solemn sanction of the Supreme Court of the United States, and has virtually been affirmed by the Supreme Court of this State. The act under consideration was passed at the first session of Congress after the adoption of the constitution, and has remained upon the statute book until the present. It was followed by another act of the 12th February, 1793, which authorized State magistrates to give a certificate

for the extradition of fugitives from labor, or fugitive slaves. This latter act was called in question, and the power of Congress to pass such laws was closely scrutinized by learned counsel, in the great case of Prigg v. The Commonwealth of Pennsylvania, 16 Peters 539; and the court there held the following language: "As to the authority so conferred upon State magistrates, while a difference of opinion has existed, and may still exist, on the point, in different States, whether State magistrates are bound to act under it, *none is entertained by this court that State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation.*"

So, in Moore v. The People of Illinois, (14 How.), this case is virtually re-affirmed; and in The United States v. Ferriera (13 *ib.* 48), Chief Justice Taney, speaking of the powers conferred upon certain officers under the treaty with Spain of 1819, said: "The powers conferred by Congress, upon the judge, as well as the secretary, are, it is true, judicial in their nature; for judgment and discretion must be exercised by both of them. But it is not judicial in either case, in the sense in which judicial power is granted by the constitution to the courts of the United States."

The same doctrine received further consideration in the matter of Kane (14 How. 103); and although the Supreme Court was divided upon the question of jurisdiction which that court possessed over the case as made by the petitioner, it appears that all the judges conceded the constitutional right of Congress to pass the law in question, vesting powers judicial in their nature in officers, to be exercised by them not sitting in the capacity of courts of the United States.

So likewise, in our own court, in the case of Gaines v. Harvin (19 Ala. 491-8), a similar provision in our State constitution came under review; and we there held, that it was not the intention of the framers of the constitution to deny to the Legislature the power to confide to ministerial officers, who do not constitute a part of the judiciary properly so called, many duties involving inquiries in their nature judicial. It was said: "The practice of this, as of all other governments having their judicial, executive and legislative departments separate and distinct, very clearly shows that, in the administration of the laws, inquiries partaking of the nature of ju-

dicial investigations are confided to persons other than judges, whose acts have never been questioned on constitutional grounds."

As the question before us is not whether Congress, acting within the sphere prescribed by the constitution, has the power to provide for the arrest and commitment of offenders against the criminal laws of the United States, but merely whether, under the clause of the constitution above alluded to, this power has been properly exercised, the same rules of construction which would apply to a similar provision in our State constitution would apply to the article under consideration.

But to conclude: The act in question was passed by the first Congress which assembled after the adoption of the constitution. The government was then principally administered by those who had framed that instrument. It must be regarded as a contemporaneous legislative exposition of the constitution, made after very mature deliberation and discussion. It has been acquiesced in ever since, and has been repeatedly recognized as a valid law by every department of the government; and if any question should be considered as put to rest by long acquiescence, contemporaneous expositions, and extensive and uniform recognition of its validity, the one before us would certainly fall within that category; and if we were doubtful as to the constitutionality of this law, these considerations would go far, if indeed we should not be required under the decisions of the Supreme Court of the United States, to determine in favor of its validity.—Stuart v. Laird, 1 Cranch 299; Martin v. Hunter, 1 Wheat. 204; Cohen v. Commonwealth of Virginia, 6 *ib.* 264; Prigg v. The Commonwealth of Pennsylvania, 16 Peters 621.

There is nothing in the objection that the exercise of this power makes the justice a Federal officer within the meaning of the second clause of the second section of article II of the constitution. He renders a voluntary service, and in an enlarged sense is, *pro hac vice*, an officer, but not one within the meaning of the clause above referred to. He is an officer of the State, and permitted by the State to aid the Federal Government in securing offenders against the criminal laws of the Union, so that they may be brought to trial before the Fed-

eral courts; and this power, we are of opinion, he may constitutionally exercise.

The petitioner having shown that he is not entitled to the relief which he seeks, the application for *habeas corpus* and *certiorari* must be overruled, with costs.

TIMS *vs.* THE STATE.

1. The constitutional guaranty of a trial by jury "in all prosecutions by indictment or information," (Art. I, § 10,) does not apply to offences created by statute since the adoption of the constitution, except in the specified cases; but it is within the power of the Legislature to make such offences triable before a justice of the peace without indictment.
2. Nor does the provision contained in the twenty-eighth section of the same article, which declares that "the trial by jury shall remain inviolate," extend the right of a jury trial to cases which were unknown, at the time of the adoption of the constitution, either to the common or to the statute law.
3. The third section of the act of February 7, 1854, (Pamphlet Acts 1853-4, p. 247,) which makes defaulting overseers of roads triable before a justice of the peace, is not violative of the right to a trial by jury, as secured by the tenth and twenty-eighth sections of the first article of the constitution; but it is unconstitutional (Art. V, § 10,) in that it makes no provision for an appeal, and the general law regulating appeals (Code, § 2811) is inapplicable to the case.
4. A repealing clause in an unconstitutional statute, declaring "that all laws contravening the provisions of this act be, and the same are hereby, repealed", does not affect the previous laws.

ERROR from the Circuit Court of Pickens.

Tried before the Hon. GEO. D. SHORTRIDGE.

THE indictment in this case, which was found at the Spring term, 1854, of the Circuit Court of Pickens, is in these words: "The grand jury of said county charge, that, before the finding of this indictment, Daniel Tims, an overseer of roads in said county, failed to discharge his duties as such overseer, against the peace and dignity of the State of Alabama."

At the Fall term, 1854, the proceedings which were had are thus set out in the record:

"1. The said Daniel Tims, in his own proper person, and by attorney, comes into open court, and in short by consent demurs to the bill of indictment against him, because (he says) he is not chargeable by law as set out in said indictment; and further, that this court has not jurisdiction in such cases.

"2. He says, that this court ought not to take further jurisdiction of this cause, because, previous to the finding of said bill of indictment, the Legislature has passed a special act, giving all such cases to the different justices of the peace in Pickens county, who alone have jurisdiction in such original suits.—See Pamphlet Acts 1853-4, No. 388, § 3. He therefore prays the court to discharge him from further pleading in this case, and that he may have judgment to go hence," &c.

The record then shows the following "Orders:"—"First demurrer to indictment overruled"; "Second demurrer to defendant's second plea sustained"; after which follows the judgment entry, which purports to have been rendered on the verdict of a jury on issue joined upon the plea of not guilty. The bill of exceptions is then set out, which is as follows: "On the trial of this case, the default of the defendant, as charged in the indictment, was proved to have occurred subsequent to the 8th day of February last. The defendant requested the court to charge the jury, that unless they were satisfied from the evidence that the default of the defendant, if any had been proved, occurred before the 8th day of February last, they must find the defendant not guilty; but the court refused to give this charge, and thereupon the defendant excepted."

TURNER REAVIS and S. F. SHELTON, for the appellant.

M. A. BALDWIN, Attorney General, *contra.*

(No briefs have come to the hands of the Reporter.)

GOLDTHWAITE, J.—By the Code (§ 1179) certain defaults and omissions of duty on the part of overseers of roads are declared to be misdemeanors, and were therefore indictable offences (Code, § 3074). By the third section of the act of 7th January, 1854, (Acts of 1853-4, 247,) it is enacted, "that defaulting overseers on roads shall be triable before a

justice of the peace of their respective precincts, subject to the same penalty as required by the law now regulating the same under higher jurisdictions"; and the same section contains a clause repealing all laws contrary to the provisions of the act. The only question raised upon the record is, as to the constitutionality of the section referred to.

On the part of the State it is urged, that it is in violation of the tenth section of the declaration of rights, which is in these words: "In all criminal prosecutions, the accused has a right to be heard by himself and counsel; to demand the nature and cause of the accusation, and have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and in all prosecutions by *indictment or information*, a speedy public trial by an impartial jury of the county, or district, in which the offence shall have been committed; he shall not be compelled to give evidence against himself, nor shall he be deprived of his life, liberty, or property, except by due course of law." It is clear, that no part of the constitutional provision we have quoted is affected by the act of 1854, unless it be that portion which gives to the accused the right to a trial by jury in all prosecutions by indictment or information, for the reason, that all the other requisitions of that section can be complied with in the proceeding before the justice. But without the authority of the law conferring the power on the justice, he would have no means of summoning and compelling the attendance of a jury; and no such power is conferred. Indeed, it is obvious that, as no provision is made for a jury by the general law, so far as justices are concerned, and none by the particular statute which gives them authority to try, a jury trial was not contemplated by the Legislature under the act of 1854.

But the benefit of a trial by jury is not reserved by the constitution to every one who is accused of a violation of the law. It is conferred as a right, by the tenth section, only in cases of prosecutions by "indictment or information"; and where an offence is created by statute since the adoption of the constitution, no right to a jury is conferred, except in the specified cases. We confine ourselves guardedly to the single case we have put, and make no intimation as to offences which

by the law in force at the adoption of the constitution were or could be proceeded against by either indictment or information. The offences which the statute was intended to reach were unknown to the common law, and have been created since the period we have named; and there was, therefore, no want of power in the Legislature to make them triable before a justice without an indictment. Having full authority over this class of cases, so far as the denial of a jury trial is concerned, it was competent for them to change the character of the offence, by the repeal of the law which made it indictable, and to reach it in another mode. This they have done in the present instance, by making the offence cognizable before a justice, whose jurisdiction in criminal cases is not limited by the constitution, although in civil matters it extends to no case in which the amount in controversy exceeds fifty dollars.—Con., Art. V, § 10.

What we have said in relation to the term "indictments", as used in the constitutional clause referred to, applies equally to "informations." That term is used in its technical sense, and refers to a common-law proceeding, by which the crown was enabled to reach indictable offences of a grave nature, without the medium of a grand jury, upon the complaint of the Attorney General filed by leave of the court.—1 Chitty's Crim. L., 842. The statute evidently has no reference to a proceeding of that character.

But it is also urged, that the act is in conflict with the twenty-eighth section of the bill of rights, which declares "that the trial by jury shall remain inviolate." In relation to this position, it is only necessary to observe, that it was not intended by this clause of the constitution to extend the right of jury trial to cases which were unknown, either to the common or statute law, at the time of the adoption of that instrument.—Boring v. Williams, 17 Ala. 510.

These are the only objections which have been raised in argument against the validity of the statute; but there is one which, although it has not been adverted to, it is not the less our duty to notice. It is founded on the tenth section of the fifth article of the constitution, which is in these words: "A competent number of justices shall be appointed in and for each county, in such mode, and for such term of office as the

General Assembly may direct. Their jurisdiction in civil cases shall be limited to causes in which the amount in controversy shall not exceed fifty dollars; and in *all cases* tried by a justice of the peace, the *right of appeal shall be secured*, under such rules and regulations as may be prescribed by law." There can be no mistake in the meaning of the last clause. It gives an appeal to the individual, as a right, in every case—civil or criminal—tried before a justice; and the wisdom of the provision is apparent, when it is remembered that the constitution fixes no limits to the jurisdiction of a justice in criminal cases. The exercise of the right may, it is true, be regulated and limited by the Legislature; but it must exist in some shape. This statute, which makes the offence triable before a justice, makes no provision for an appeal. But it may be urged, that the general law, allowing appeals to be taken upon any judgment rendered by a justice of the peace, (Code, § 2811) fulfils the constitutional requisition. The provisions of the Code are, in this respect, substantially the same as the old law (Clay's Dig. 314, § 9); and it is evident they were not intended, and indeed would be wholly inadequate to meet the exigencies of the cases covered by the statute under consideration. The bond, or undertaking, which is required before the appeal is taken, is to be payable to the person in whose favor the judgment is rendered (Code, § 2811); and notice of the appeal is to be given the appellee. By the Code (§ 3625), as well as by the former law (Clay's Dig. 441, § 22), imprisonment was required to be imposed on the offender, if the fine was not paid or judgment confessed; and the act of 1854, in express terms, subjects the defendant, if convicted, to the same penalty. But the law of appeals provides no means for securing the personal attendance of the appellant, so that it might become impossible to enforce the penalty of imprisonment. In any aspect in which we are able to view it, we cannot regard the general law regulating appeals from a justice as applicable to the conviction of an overseer under the act we have considered. The law we have referred to having no application, and the act itself not providing for an appeal, the constitutional right is not secured, and it is our duty to declare the third section of it invalid, except so far as it repeals the laws in conflict with the provisions of the

other sections which have no relation to the trial before the magistrate.

But it is insisted, that conceding the act to be void in the respect we have declared—still the Legislature had the power to repeal the previously existing laws in conflict with this provision. This is unquestionable; and if the repealing clause had declared that so much of the previously existing laws as made defaults of overseers cognizable by indictment, was repealed, a different case would have been presented. But the evident intention of the Legislature was, that the provisions of the former law were only to be repealed if in conflict with the act. The words are, "that all laws contravening the provisions of this act are hereby repealed." If the new law is void, the provisions of the former law cannot with propriety be said to be in conflict or contravention of it.

Judgment affirmed.

Ex parte GARLINGTON.

1. *Mandamus* from the Supreme Court does not lie to compel the Circuit Court to strike a cause from the docket, on motion, on the ground that it has been discontinued by a submission to arbitration.

Application for a *mandamus* to the Circuit Court of Chambers. Hon. Robert Dougherty, presiding.

The petitioner (Joseph E. Garlington) alleges that a suit was instituted against him, in the Circuit Court of Chambers, by M. H. Gladden, endorsee of Julius C. Eckles; that he afterwards entered into a written agreement with the real plaintiff in said suit to submit the matters in controversy therein to arbitration; that at the succeeding term of the court he proved this fact to the court, and moved to strike said cause from the docket, on the ground that said submission to arbitration operated a discontinuance of the suit; but the

court overruled his motion, and he excepted to its ruling. Appended to the petition, as a part thereof, is a transcript of the proceedings had in said cause, containing a bill of exceptions, signed by the presiding judge, in which the facts alleged in the petition are set out; and on these facts the petitioner asks for a rule *nisi* against the judge of the ninth judicial circuit, sitting for the county of Chambers, to show cause why a peremptory *mandamus* should not issue from this court, requiring him to strike said cause from the docket.

L. E. PARSONS and J. W. SHEPHERD, for the motion:

1. That the submission to arbitration was a discontinuance of the suit, see Camp v. Root, 18 Johns. 22; Miller v. Vaughan, 1 *ib.* 314; Stevenson v. Beecker, *ib.* 492; Bean v. Parker, 17 Mass. 591; *Ex parte* Wright, 6 Cow. 399; Van Cortlandt v. Onondaga C. P., 1 Wend. 314; Larkin v. Robbins, 2 *ib.* 506; Town v. Wilcox, 12 *ib.* 503; Hutchings v. Buck, 32 Maine 277.

2. That *mandamus* lies on the refusal of the Circuit Court to strike the cause from the docket, see 1 Wend. 314; 12 *ib.* 503; 6 Cow. 399; Dixon v. Fields, 5 Eng. 243; Cortleyou v. Ten Eyck, 2 Zabr. (N. J.) 45; 4 Ala. 320; 7 *ib.* 757; 10 *ib.* 598; 17 *ib.* 527.

J. E. BELSER, for the plaintiff in the suit, resisted the motion.

PER CURIAM.—The application must be overruled, on the authority of several adjudged cases.—See *Ex parte* Elston, 25 Ala. 72; *Ex parte* Small, *ib.* 74; *Ex parte* Rowland, at the present term.

MONTGOMERY'S EXECUTORS *vs.* KIRKSEY.

1. The relationship of all the parties to a deed of trust made by an insolvent debtor furnishes no predicate for a legal presumption or conclusion of fraud, although it is a circumstance which may go to the jury, to be considered by them, in connection with the other facts in the cause, in determining the question of fraud in fact; but if the court, in charging hypothetically upon the facts, predicates the conclusion of fraud upon the fact of such relationship, in connection with other facts which, if true, are in themselves sufficient to render the deed fraudulent in law, the charge is too favorable to the claimant under the deed, and he therefore cannot complain of it on error.
2. A deed of trust, executed by an insolvent debtor, conveying all his property in trust to secure the payment of a portion of his debts then past due, leaving other creditors unprovided for, and stipulating that the grantor should retain the possession of all the property until the law day of the deed, and for such longer period as the sale might be postponed by the secured creditors, and that the surplus after paying the secured debts and expenses should be refunded to him,—is fraudulent and void in law as against the unsecured creditors.
3. The facts that the defendant's father became the purchaser of all the property at the trustee's sale under the deed, and suffered it to go back to the defendant's possession immediately after the sale, "with permission to get a subsistence for himself and family, but to turn over all beyond this to his father, and that the property was to be under the general supervision and control of his brother as agent of his father," do not, if the deed was *bona fide*, and the purchase fairly and honestly made, justify any presumption of fraud, nor raise any question under the statute respecting three years' possession under a pretended loan. The uncertainty in the amount of compensation by way of maintenance, is a circumstance for the consideration of the jury in determining the question of fraud, which, if all the previous transactions were *bona fide*, the fact of relationship may serve to explain; and the rule which makes the retention of possession of personal property by the vendor *prima facie* evidence of fraud, does not apply to sales at public auction after notice.
4. Under the statute in relation to pretended loans of personal property, (Clay's Digest, p. 254, § 2.) three years' uninterrupted possession by the loanee is required to make the property subject to his debts: if the lender, with the view of avoiding the effect of the statute, resumes the possession before the expiration of three years, and retains it for one or two days, this cuts off the statute at that point, and the loanee's subsequent possession will date from the time when the property is restored to him.
5. Although three years' possession of slaves by the loanee makes them under this statute subject to his debts, this does not give his creditors a right to crops partly grown by them, or other products of their labor, which have not been in his possession three years.

APPEAL from the Circuit Court of Talladega.
Tried before the Hon. JOHN GILL SHORTER.

TRIAL OF THE RIGHT OF PROPERTY in thirty-three bales of cotton and other personal property, between Isaac Kirksey, plaintiff in execution, and Hugh Montgomery, claimant. The plaintiff's execution was issued on a judgment which he had recovered against William Montgomery, in the Circuit Court of Talladega, on the 7th of November, 1842, for $791, besides costs, and was levied on the property in controversy on the 19th of January, 1850; and the claimant, who was the father of said William Montgomery, relied on a purchase at a public sale made by the trustee in a certain deed of trust executed by said William Montgomery, which is hereinafter more particularly described.

On the trial, as appears from the claimant's bill of exceptions, the plaintiff read in evidence to the jury the execution under which the levy was made, with the endorsements thereon, "and also made out a *prima facie* case by proof of possession of the property levied on"; and the claimant then read in evidence, after proving its execution and due registration, a deed of trust from said William Montgomery to James Montgomery, dated the 11th of June, 1842, conveying to the said James, as trustee, certain real and personal property, to secure the payment of certain debts of the grantor then past due. The debts secured by this deed are the following: to Hugh Montgomery, several debts, due by promissory notes, amounting in all to about $3,500; to Andrew Cunningham, a debt of $770; to Cunningham & Story, a mercantile firm, a debt of about $120; to Daniel H. Jackson, a debt of $100; and to the Branch Bank at Huntsville, a balance of about $200—amounting, exclusive of interest, to nearly $5,000. The property conveyed consists of the grantor's plantation, on which he then resided, containing about two hundred acres, together with the growing crop; also, the growing crop on fifteen acres of rented land, ten negroes, two mules, two horses, forteen head of cattle, thirty-five hogs, fourteen sheep, a wagon and harness, farming utensils, and household and kitchen furniture. The trusts specified in the deed are as follows:

"That if, on the first day of October, 1842, all or any of said debts and liabilities shall remain due and unpaid, then, and in that event, the said James Montgomery shall proceed to sell, for cash, to the highest bidder, before the court-house door in the town of Talladega, at public auction, first giving ten days' notice of the time and place of such sale by publication in some newspaper published in this State, or by written advertisement put up at the said court-house door in the town of Talladega, all of said real and personal property, or so much thereof as may be necessary to the full and complete payment of all said debts then and thereafter remaining due and unpaid; and the proceeds of said sale are to be applied by said James Montgomery to the payment of said debts; and if the said property should be insufficient to pay all of said debts, then the said proceeds are to be applied to the payment of said debts in proportion to their several amounts, and the excess, if any, after paying all necessary expenses upon the execution of this deed of trust, to be paid over to said William Montgomery, or his representatives. And it is also expressly understood and agreed, that all of said property, both real and personal, is to remain in the possession of said William Montgomery until the day of sale. And it is further understood and agreed, that, if the parties for whose benefit this deed is made shall think proper to postpone the sale of said property beyond the time hereinbefore mentioned, they shall have full power to postpone and delay the sale to such time as they may think proper; in which event, the said property is still to remain in the possession of said William Montgomery (but the said James Montgomery is to be fully entitled to the growing crops) until the sale shall be made by order of the said parties for whose benefit this deed is made."

"The claimant then proved, that on the 14th of April, 1843, after notice in writing of the time and place of sale in accordance with the terms of said deed, the property therein named was put up at public sale at the court-house door in the town of Talladega, and sold to the highest bidder for cash. There was evidence, offered by plaintiff in execution, tending to show that said sale, and the purchase made under it, were fraudulent; but there was also evidence, offered by the claimant, tending to show that the sale and purchase were fair and

bona fide. At this sale Hugh Montgomery, the father of said William Montgomery, became the purchaser of all said property. After said sale, the property was carried back to the residence of William Montgomery, and remained in his possession (except as hereinafter stated) up to the time of the levy. The claimant offered evidence, also, tending to show that the debts named in said deed of trust were *bona fide*; and plaintiff offered evidence tending to show that they were not. The evidence tended to show, also, that the debts named in said deed were all the debts the said William Montgomery owed, except the debt due to plaintiff in execution, and a security debt of about $1,500 which he owed to the Branch Bank at Decatur, which his co-surety afterwards paid; and that the sureties of the debt to the Huntsville Bank, mentioned in said deed of trust, were near relations of said William Montgomery.

"The plaintiff's execution in this case is founded on a judgment obtained on a note given by said William Montgomery for land sold by said plaintiff in execution (Isaac Kirksey) to him. The said land, being bound for the said purchase money at the time the deed was executed, was afterwards sold by said plaintiff in execution, under a decree, obtained on a bill filed by him for that purpose, to sell said land for the payment of the purchase money; and at the sale under said decree James Montgomery became the purchaser. This is the same land contained in the deed of trust, and was sold under said deed, and purchased by Hugh Montgomery, before Kirksey filed his bill to assert this lien.

"The evidence conduced to show, also, that the property sold under said deed was returned by said Hugh Montgomery to the possession of said William Montgomery, with permission to get a subsistence for himself and family, but to turn over to him all beyond this; and that the property was to be under the general supervision and control of James Montgomery, as the agent of said Hugh. The claimant offered evidence, further tending to show that the property was thus held by William Montgomery from the time of the sale up to the date of the levy. It tended to show, also, that William Montgomery never claimed the property as his own after the sale in April, 1843, but acknowledged it to be the property of the

claimant, Hugh Montgomery; that James Montgomery, as agent for said Hugh, had taken the slaves out of said William's possession, without consulting him, at intervals of less than three years from the time of the sale, up to the time of the levy, and retained possession of them for a day or two at a time, controlling them as the property of said Hugh. The evidence conduced to show, also, that said James took possession of said slaves, as agent as aforesaid, for the purpose of avoiding the statute of three years' possession. The evidence also further tended to show, that said James, as agent as aforesaid, controlled the cotton crops, selling them, and receiving the money for them, but that William used and disposed of all the other crops raised on the place; and it was further shown, that William and James Montgomery occupied different farms.

"On the other hand, the plaintiff in execution offered evidence, tending to show that William Montgomery controlled this slave property and other property in all respects as his own, from the date of the deed up to the date of the levy; and that when the property was taken out of his possession by James Montgomery, as aforesaid, it was returned to him again without any new understanding or agreement with him; that it went back to his possession immediately after the sale in April, 1843, and (with the exception of the times when the property was taken from his possession to avoid the statute, as aforesaid) had remained in his possession ever since, and had been under his exclusive management.

"The evidence further tended to show, that shortly after the sale in April, 1843, William Montgomery left the land on which he resided at that time, and for which he had given plaintiff the note on which this judgment and execution were obtained, and went to live on land purchased for him by said James, as agent as aforesaid for said Hugh, and paid for by him, as such agent, out of the proceeds of crops raised by the labor of said slaves. The cotton levied on was the crop made by said slaves on the land thus purchased by said James, as agent as aforesaid, during the year preceding the levy. The evidence conduced to show, also, that all James Montgomery had done in reference to the property he did as agent for Hugh Montgomery, and by his consent, and under his instructions.

"Upon this state of facts, the court charged the jury—

"1. That the deed of trust, made by William Montgomery to James Montgomery was not fraudulent upon its face; but, if all the parties to the deed were related to each other, and there were other creditors of William Montgomery than those named in the deed at the time of its execution, and this was known to all the parties who were provided for by said deed, and all the property which William Montgomery owned was included in said deed,—that then said deed was fraudulent and void as to such excluded creditor.

"2. That if they believed that the negroes named in said deed, after the purchase by Hugh Montgomery, were permitted by him to remain in the possession of said William Montgomery under a loan, without deed or writing recorded, for three years previous to the levy, and that the cotton levied on was produced by the labor of the negroes on the plantation occupied by William Montgomery, then the cotton levied on would be subject to plaintiff's execution, although James Montgomery, as the agent of said Hugh, had taken said negroes into his possession, for a day or two at a time, at intervals of less than three years, if they believed that such possession was had by arrangement or collusion with William Montgomery, with a view to prevent the operation of the statute of three years.

"The claimant asked the court to charge the jury—

"1. That if they believed the property was purchased by Hugh Montgomery in good faith at said trust sale, and was carried to the premises of Hugh or James Montgomery; and that William Montgomery was suffered to live upon said premises, and to use the property purchased so as to obtain a subsistence for his family out of the same, and was bound to account to Hugh Montgomery, or his agent, for the surplus, and did so account; and that the place was under the supervision of James Montgomery, as agent for said Hugh,—then the statute respecting pretended loans did not apply. This charge was given, with the qualification, if William Montgomery and family resided on the same farm with James or Hugh Montgomery; but, if he and his family cultivated and lived upon a separate farm, then the statute would apply.

"2. That if they believed the cotton levied on was the joint

product of the land of James Montgomery and the negroes purchased under said deed of trust by Hugh Montgomery, and that the cotton had not been in the possession of William Montgomery for three years at the time of the levy, then it was not subject to plaintiff's execution under the statute of three years.

"The court refused each one of the charges as asked; and to each refusal, as also to the charges given, the claimant separately excepted."

The charges given, and the refusals to charge as requested, are now assigned for error.

WHITE & PARSONS, for the appellants;

1. The deed of trust from William to James Montgomery is not fraudulent on its face. The provision that the sale may be postponed by the parties for whose benefit the deed was made does not, as the appellee's counsel insists, render it fraudulent. This court has decided, that where it cannot clearly see that a deed is fraudulent on its face, the question of intent must be submitted to the jury in connection with all the other facts and circumstances.—Johnson v. Thweat, 18 Ala. 741; Elmes v. Sutherland, 7 *ib.* 262; 8 *ib.* 106; also, 2 Metcalf's R. 99. There is nothing on the face of the deed to show that the grantor was insolvent, or in failing circumstances; and the fact that perishable articles are conveyed by it, with a reservation of the use to the debtor, does not alter it. The reservation of the use to the grantor until the law day of the deed, is nothing more than the law would have given him without any express reservation in the deed. Dubose v. Dubose, 7 Ala.; Elmes v. Sutherland, *supra*. The grantor only retained the right of possession until the sale, and whatever surplus (if any) might remain after satisfying the secured debts and the expenses of the trust; and these were open to his creditors. That his possessory interest might be sold, see Williams v. Jones, 2 Ala. 314; Planters & Merchants' Bank v. Willis, 5 *ib.* 771; Magee v. Carpenter, 4 *ib.* 469. There is nothing in the terms of the deed inconsistent with good faith, and it does not necessarily hinder or delay creditors. If the trustee were to refuse to act promptly, or within a reasonable time, he might be compelled to do so in

equity.—Evans v. Lamar, 21 Ala. 336. It will be time enough to cry fraud, when the creditors attempt to postpone the sale in such a manner as to hinder or delay the unsecured creditors. It will be observed, that the deed only provides that the secured creditors *may* postpone the sale, &c. Now, unless this power was actually exercised in a fraudulent manner, how can it be said that the deed hindered the other creditors? But it will be seen from the evidence, that the sale took place in April, 1843, and therefore no fraudulent use was made of the deed.—Jones v. Williams, 2 Ala. 314; Anderson v. Hooks, 9 *ib.* 704; 4 *ib.* 379; 9 Porter 566. As to the right of the unsecured creditors to have the trust closed, and the surplus paid over to them, see Dubose v. Dubose, 7 Ala. 235; Pope v. Wilson, *ib.* 690; Graham v. Lockhart, 8 *ib.* 9. Again; the grantee must participate in the fraudulent intent on the part of the grantor, if there was one, to invalidate the deed. Hooks v. Anderson, *supra*. And the embarrassment of the debtor, his relationship to the creditor, nearness of residence, &c., are not sufficient to warrant the inference of fraud, because all this may be consistent with good faith.—7 Ala. 142; 9 *ib.* 704; Garland v. Chambers, 11 S. & M. 337.

2. There was no evidence going to show that all the parties to the deed of trust were related to each other; and therefore the first charge is erroneous. That charge withdrew from the jury the consideration of the *bona fides* of the grantor and the other parties to the deed, and made the whole question turn on the relationship of the secured creditors to the grantor and their knowledge that he had other creditors unsecured by the deed, and that all his property was conveyed by the deed. All these facts might consist with good faith and fair intention.—Stokes v. Jones, 21 Ala. 731; Bank v. Taylor, *ib.* 582; Bank v. Lanier, 18 *ib.* 629; 17 *ib.* 611; 9 *ib.* 944; 18 *ib.* 745; 7 *ib.* 142; 9 *ib.* 712.

3. The error of the second charge is apparent: the statute requires an uninterrupted possession of three years, while the charge says this is not necessary.—Stubblefield v. Oden, 9 Ala. 651; Brainard v. McDevitt, 21 *ib.* 124. If an interval of a day or two may be disregarded, what is there to prevent a greater interval from being disregarded? The letter of the statute, where the plaintiff's title depends upon it, must

be followed. By the return of the negroes to the possession of their owner, the right of the loanee and those claiming under him was gone; and upon their return, the statute began to operate anew. As between the lender and loanee, property held under a gratuitous loan remains the property of the original owner, although it may have been in the possession of the loanee for more than three years. After the expiration of the three years it is subject to the loanee's debts, and the creditor's right attaches to it, provided he has acquired a lien by placing his execution in the sheriff's hands while it is yet in the possession of the loanee; but if the lender has resumed the possession before the lien has attached, the property is no longer subject to the demand of the loanee's creditor. Maull v. Hays, 12 Ala. 500; McCoy v. Odom, 20 *ib.* 502; Knight v. Bell, 22 *ib.* 198; 10 Leigh's R. 5.

4. The case hypothetically stated in the first charge asked by the claimant, does not make the relation of lender and loanee under the statute of frauds, but only a permissive occupation of the premises and use of the slaves, coupled with an interest in the family of the defendant, and an accountability to the agent of Hugh Montgomery for the proceeds of the labor of the slaves and products of the farm, with a superintendence over the whole by that agent.—Johnson v. Branch Bank at Montgomery, 7 Ala. 379; State Bank v. Croft, 6 *ib.* 622.

5. The cotton was grown, on the land which Hugh Montgomery had purchased, by the labor of the slaves. There is no pretence for saying that the statute of three years' possession applied to it, unless the fact of its being the product of their labor is sufficient. The evidence does not show that the slaves had been in the possession of the defendant in excution for three years at the time the cotton was produced; and if not, then both the slaves and the cotton were the property of the claimant, and not subject to defendant's debts. To sustain this charge of the court, it must be assumed that the cotton was liable to the payment of the debt, not because it was the product of the labor of slaves who were at that time liable to the execution, but because they afterwards became so. Branch Bank at Mobile v. Ford, 13 Ala. 431; 5 *ib.* 744.

JOHN T. MORGAN, *contra*:

I. The deed of trust devotes the whole of the grantor's property, real and personal, to the payment of the debts to his relations. The grantor was insolvent, and owing debts to a large amount not secured in the deed. The debts secured by the deed are all past due; the law day of the deed is postponed for five months after the execution of the deed, and the deed contains a provision that all the property, real and personal, is to remain in the possession of the grantor until the day of sale; and if "the parties for whose benefit the deed is made *shall think proper to postpone the sale*, beyond the time specified, they shall have full power to postpone and delay the sale *to such time as they may think proper*;" in which event, the property is still to remain in the possession of the grantor, until the sale shall be made by the order of the parties for whose benefit this deed is made; but the said James Montgomery is to be fully entitled to the "*growing crops*". All these facts were known to all the parties when the deed was executed. These facts, if they were all distinctly incorporated in the deed, would make it fraudulent upon its face.

1. Because the deed, not being a deed of assignment, (by which all the creditors of the grantor are secured an interest in all of his property,) does not in good faith devote the property conveyed, (being all that he had of every description,) to the payment of the preferred creditors, but reserves the possession to himself, and puts it in the power of his relatives and preferred creditors to continue that possession in him so long as they may choose; and in the meantime to take *the benefit of the crops to himself*, except the "*growing crop*" which had already been specified in the deed, and which means *the crops then* growing. This is a stipulation of the deed, and it will not do to say that the parties benefited by the deed may order a sale of the property conveyed very soon. Suppose they do not; if the grantor has *the right* to incorporate such a provision in the deed, and if it is not inconsistent with honesty of intention to do so, the parties benefited may keep him in possession for twenty years, consistently with the provisions of the deed, and keep off the creditors not embraced in the deed. Such a provision in the deed of an insolvent man, or one in failing circumstances, is utterly inconsistent

with any sound ideas of honesty.—Gazzam v. Poynts, 4 Ala. 382; Hindman v. Dill, 11 *ib.* 689; Grimshaw v. Walker, 12 *ib.* 102; Planters & Mer. Bank v. Clarke, 7 *ib.* 770; Wiswall v. Ticknor & Day, 6 *ib.* 178; Bullard v. Hazzard, 1 Porter 139; Rugely v. Harrison, 10 Ala. 731; Pearson v. Moreland, 7 S. & M. 609; Cummings & Cooper v. McCollough, 5 Ala. 324; Herrin v. Morford, 9 Dana, 450.

2. The reservation of the right of possession of perishable property (such as cattle on a farm, grain, growing crops, and all household furniture, sheep and hogs, upon a plantation,) is equivalent to a reservation *of the use of that property*, when it appears *that it is all the man has to live upon*; can it be intended to support the *bona fides* of such a reservation, that the grantor was willing to starve himself in order to give a preference to creditors? There is no stipulation in this deed, that the possession of the grantor of the property is for the benefit of the trust fund; and if there was such a stipulation, it would read strangely in connection with the other recitals, which the judge's charge incorporates into it, viz.: the grantor is insolvent; owes other debts; conveys all his property; and all the beneficiaries of the deed are his relations. Could he have retained the possession for the sole and pure purpose of making the trust estate secure the debts?—Johnson v. Thweat, 18 Ala. 741; Somerville v. Horton, 4 Yerger 550, cited in Ravisies v. Alston, 5 Ala. 302.

3. But, if it is understood that the deed conveys the crops then growing, and to be grown during the period that the beneficiaries might allow the grantor to remain in possession, and that it was one of the purposes of the deed that these crops should be applied to the payment of the debts; this view of the case does not relieve the deed from its fraudulent character. A debtor has no right to tie up property in the hands of a trustee, until the rents and profits may discharge the debt.—Cases cited *supra*, and Vernon v. Martin & Smith, 8 Dana 263.

4. All that was wanting to make the deed fraudulent upon its face, was for it to have shown that William Montgomery was insolvent, and had conveyed all his property in the deed, and owed other debts at the time the deed was made, not provided for in the deed. These facts being shown, admitted

of no explantion, and it was the duty of the court to pronounce the judgment of the law upon the case.

5. West, Oliver & Co. v. Snodgrass, 17 Ala. 549, shows the limit to which our court will go, in support of the assignments of insolvent debtors.

6. The degree or character of fraud, which would authorize a court, upon the facts stated on the face of the deed, to declare it void, need not be different, or stronger, than that which would authorize a jury to find the fraud, upon the same state of facts, not embraced in a deed. The court must construe every deed, if called upon, either by its four corners, or in connection with facts in proof; and in this discharge of duty, the court will look to all the facts, and decide each case upon its own features.—Johnson v. Thweat, *supra*. The evidence need not be sufficient to exclude a doubt, but only to raise a presumption of fraud.—Borland v. Walker, 7 Ala. 269; Petrie's Ex'r v. Wright, 6 S. & M. 647; Swift v. Fitzhugh, 9 Port. 39.

II. The second charge given affirms that if the cotton was produced by negroes *loaned* by Hugh to William Montgomery, upon land in the possession of William Montgomery, it was subject to the execution. This is a correct proposition, for if the negroes *were loaned to William Montgomery*, he could certainly enjoy the benefit of their labor, and it was of no consequence how often, or when they went back into the possession of the bailor. But the other propositions contained in the charge are correct, if they are in condition to be considered.

1. If there was a loan, and a possession under that loan for three years, without deed recorded, &c. The mere fact that *the possession was taken*, by the agent of the bailor, *for a day or two at a time, at intervals of less* than three years, cannot defeat the operation of the statute. Such an agent might take the possession, *at such intervals*, and keep it for that length of time very consistently with the right of the bailee to hold it under the original loan. And besides, the attempt to defeat the statute by a collusive change of the possession is not the prosecution of the claim by due course of law, but is only an addition of actual fraud to the constructive fraud which the statute attempts to guard the community against.

McLaughlin's Adm'r v. Daniel, 8 Dana 187, 189; Gressett v. Agee & Dumas, 14 Ala. 355; Myers v. Peck, 2 *ib.* 638. The original loan would not be determined between the original bailor and bailee, upon a mere collusive change of the possession back and forth between them.—Stephens v. Barnett, 7 Dana 259.

2. The possession of a loanee, under the first charge asked, would have been sufficient under the statute of frauds, for the possession of his family is his own possession.—McCoy v. Odom, 20 Ala. 502. The farm was in the separate possession of the loanee. The charge is silent as to whether he accounted for the surplus proceeds of the farm annually, or at what intervals.—Myers v. Peck, cited *supra*.

III. The second charge asked was properly refused. It called upon the court to say that the purchase of the negroes under the deed of trust, conferred the title upon Hugh Montgomery, or James Montgomery, without respect to the questions of fraud raised in the case. It further called upon the court to decide that the statute of frauds could not affect the title to cotton raised by negroes, if the negroes "*were purchased under the said deed of trust*", and was raised on James Montgomery's land. What deed of trust is "*said deed of trust*"?

CHILTON, C. J.—1. As to the first charge: We may leave out of view the relationship of the parties, as constituting one of the conditions upon which the judge predicated the conclusion of fraud, in this charge; for, if this was an error, it was favorable to the appellants, requiring the jury to find that all the parties to the deed were related, when, in our opinion, aside from the relationship of the parties, if the jury found the other facts hypothetically stated in the charge to exist, they might well have been instructed to find the deed fraudulent. The relationship of the parties, upon a question of fraud in fact, was a circumstance which might properly enough go to the jury to be considered by them, in connection with the other facts in the cause, in ascertaining the *quo animo* the deed was made; but it furnishes no predicate for a legal presumption or conclusion.

The charge, stripped of this superfluous matter, presents

the question, whether a deed, made by an insolvent, of all his property, to a trustee, in trust for the payment of some of his debts, leaving other debts unprovided for, and containing stipulations beneficial to the grantor—namely, that he should retain the property, the use of which is valuable, for several months until the law-day, and for such longer period as the parties secured may postpone the sale; and that the surplus, after satisfying the secured debts and the expenses, should be refunded to the grantor—is not, as a conclusion of law, fraudulent and void, if these facts were known to the parties to it? We do not hesitate to say, that had all these facts appeared upon the face of the deed, or been returned by a special verdict of a jury, we should feel constrained to hold, irrespective of the intention of the parties, that the deed was fraudulent and void in law as against the creditors not provided for. It is not permissible for any one thus to avail himself of a part of his indebtedness to tie up all his property and exempt it from liability for his other debts, while he has the temporary benefit of the use of it and a contingent residuum. Such assignments, when these facts appeared on their face, have uniformly been declared fraudulent in law. That the facts do not appear on their face, only puts the party upon whom the burden of proving fraud is devolved to the necessity of otherwise establishing their existence, and of showing that the beneficiaries were cognizant of them. Several adjudged cases of this court show that such deeds cannot be upheld.—Gazzam v. Poyntz, 4 Ala. 382; Hindman v. Dill, 11 *ib.* 689; 7 *ib.* 770; 6 *ib.* 178; 12 *ib.* 102; 5 *ib.* 324; 10 *ib.* 731.

There was, therefore, no error in the first charge given by the court, of which the appellants could complain.

As to the second charge: We are not at all sure that it was warranted by the proof disclosed by the bill of exceptions. It is said, the proof tended to show that the property, after the sale under the deed of trust, and the purchase by Hugh Montgomery, went back to the possession of William Montgomery, "with the permission for him to get a subsistence for himself and family, but to turn over to Hugh Montgomery all beyond this; and that the property was to be under the general supervision and control of James Montgomery, as the agent of Hugh." There was other evidence,

tending to prove that William Montgomery, from the date of the deed until the time of the levy, controlled the property in all respects as his own; that it had been taken into possession of James Montgomery for a short time—a day or two—before the expiration of three years, for the purpose of avoiding the three years' statute as to loans the evidence of which is not recorded, but was returned to William Montgomery without making any new arrangement, and had been under his exclusive management and in his possession ever since. The proof conduced to show, that the cotton which was the subject of controversy was raised by these slaves, on land purchased by James Montgomery, as agent of Hugh Montgomery, and paid for by him out of cotton crops raised by the slaves. Such being the proof, when stated in the strongest light for the appellee, we are much inclined to doubt whether it raises any question as to the three years' possession under a pretended loan. If the deed was *bona fide*, and the purchase by Hugh Montgomery of the slaves and other property was fairly and honestly made, he had as much right to contract with his son, the defendant in the execution, to take possession of the property and work it on land which he would purchase, retaining a subsistence for himself and family as a compensation for his care and trouble, as he had to employ an overseer in the same way, or for a stated compensation. The uncertainty as to the amount of the compensation by way of maintenance, is a circumstance to which the jury may look in determining whether this was not a part of a scheme designed to secure the property to the son, to the exclusion of his creditors; but, if all the previous transactions by which Hugh Montgomery acquired the property are *bona fide*, the fact of relationship may serve to explain why the same degree of particularity as to compensation was not observed as would be likely to have obtained had the father dealt with a stranger.

Neither can any presumption of fraud be predicated upon the isolated fact, that the property went back into the possession of William Montgomery immediately after the sale. The rule which makes the retention of personal property by the vendor *prima facie* evidence of fraud, does not apply to sales made at public auction after notice, as in this case. If,

then, there was an agreement that William should retain the slaves and farm of Hugh, and deliver over the proceeds to the agent of Hugh, which might remain after deducting a subsistence for himself and family, and there was no fraud in the acquisition of the property in Hugh, the statute above alluded to respecting possessions under loans for three years has nothing to do with the case.

But, conceding that the facts brought the property into that category, we are still of opinion, the second charge was erroneous, as to the alleged interruptions of the possession by Hugh Montgomery, through his authorized agent, taking possession before the expiration at any time of three years' continuous possession.

The object of the statute doubtless was, to prevent persons from obtaining collusive credit, or lulling their existing creditors into false security, by the possession of property apparently their own, and upon the faith of the liability of which, from long continued possession, to the satisfaction of the possessor's engagements, his creditors may well be deemed to have reposed. An *actual, bona fide change* of the possession, before the expiration of the three years, cuts off the statute at this point, and the loanee's subsequent possession as to its duration must date from the time the property is returned to him. Nor is it material that this change was designed to avoid the effect of the statute. The owner had a right to avoid it, and by an open, ostensible act, retake his property and resume his dominion and control over it. Nor has the law fixed upon any specific period of time which the owner must retain the possession before its return, in order to constitute it such an interruption of the possession as shall preclude the operation of the statute. A mere constructive possession will not suffice; *that* the owner has all the while, and it is what the statute strikes at when it is opposed to the claims of the *actual* possessor's creditors. Nor will we say that a momentary interruption will suffice: but, if the possession be actually and *bona fide* changed for a day, or two days, we see no reason why such change should not be as available as one month, or one year. The charge assumes, that if the change of possession was by an *arrangement* between the parties, or collusive, &c. Now the parties might honestly have

so arranged, without any intention of deluding or defrauding creditors or purchasers; and if it was *bona fide*, it could not affect the rights of the lender.

From these considerations, we are of opinion, the second charge was erroneous,—that the first charge asked by the appellant should have been given as asked, and that the qualification superadded by the court was erroneous; for, in our view, it was wholly immaterial, (conceding the facts stated in this charge to be true, and the validity of the trust deed,) whether William lived on the same farm with Hugh or James Montgomery, or lived upon and cultivated a place separated from theirs.

The second charge prayed for by the appellant should have been given. It by no means follows, because the law says, that if William Montgomery has retained possession of the slaves for more than three years on a pretended loan, these slaves shall be liable to his debts, that other property belonging to him, the product of the labor of the slaves, but which has not been in his possession three years, shall be liable. The property is separate and distinct. There is no such necessary connection between the slaves and the cotton which their labor has contributed in part to produce, as that the one must occupy the condition of the other. As between the loanee and the actual possessor, the property belongs to the former, notwithstanding three years have elapsed without claim made, &c., as required by the statute. Its produce may, by the agreement of the parties, occupy the same *status*. The creditor's right is, to subject the property which has remained with his debtor for three years; and if he chooses to pass by that, and levy upon other property which has not been held for this period, we know of no principle which authorizes him to transfer his lien in this way, upon the idea that property which he might have subjected contributed to produce that levied upon.

For the error we have mentioned, the judgment of the Circuit Court must be reversed, and the cause remanded.

RICE, J., did not sit in this case, having been of counsel before his election to the bench.

OWNERS OF STEAMBOAT FARMER *vs.* McCRAW.

1. When an attachment is sued out against a steamboat to recover damages for injuries caused by her running into a flat-boat, (Pamphlet Acts 1843-4, p. 98,) the declaration must be against the boat itself, and not against the owners, although the attachment bond is made payable to the owners, and their names are also stated in the affidavit on which the attachment was issued.
2. The refusal of the primary court to strike from the files a declaration against the owners of the boat, is a reversible error.
3. Proper practice prescribed for declaring against a boat under this statute, and for the intervention of her owners.
4. The proceedings under this statute, except so far as they are changed by the act itself, must be governed by the rules of the common law; and therefore any facts which would defeat an action on the case against the owners at common law will have the same effect when pleaded to proceedings against the boat.
5. The general rule of the common law is, that if both vessels are to blame, neither can recover damages for injuries caused by the collision; but this rule applies only to faults which operated directly and immediately to produce the collision.
6. There is no inflexible rule, either of the river or of the road, the neglect of which by one party will dispense with the exercise of common caution by the other.
7. "Ordinary care" is altogether a relative term; and in such cases as this, the want of it means nothing more than the failure to use those precautions which a just regard to the persons and property of others demands should be used under the circumstances of each particular case.
8. A common carrier, as he is not absolved from liability to the owner of the goods by the torts of third persons, has a right to maintain an action for the wrong; and a recovery by him for the injury done to the goods will be a bar to a subsequent action by the owner for the damage or loss resulting from the same injury.
9. But where the owner of the lost or damaged goods brings his action against the owners of the boat which caused the loss or damage by running into the flat-boat on which the goods were, a plea of a former recovery by the common carrier for the injuries caused by the collision, "which (it avers) are the same injuries in the plaintiff's declaration alleged to have been done to the goods of the said plaintiff," is not equivalent to an averment that the recovery was for the damage done to the goods described in the declaration —*non constat*, that it may not have been for damages done to the goods of some other person which were on board the flat-boat at the same time; such a plea, therefore, is defective on demurrer.
10. The owner of the flat-boat, who had charge of her at the time of the collision, is not a competent witness for the owner of the damaged goods, in an action against the steamboat for damages; nor is he made a competent witness by the Code (§ 2302).

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was commenced in May, 1852, by attachment, sued out by the appellee against the steamboat Farmer, to recover damages for injuries done to seventy-eight bales of cotton, belonging to the plaintiff, by a collision between the steamboat and a flat-boat on which the cotton was shipped. The affidavit, on which the attachment was issued, alleged that the steamboat, at the time of the collision, "was commanded by Edward F. Shields, and claimed and owned by said Shields, Jacob B. Walker, and Daniel Walker"; and the attachment bond was made payable to them as such owners. The attachment was issued by a justice of the peace, and was made returnable to the then next ensuing term of the Circuit Court of Dallas. The sheriff returned the writ, "Levied this attachment, the 19th May, 1852, upon the steamboat called the Farmer, with tackle and apparel, as the property of Ed. F. Shields and others; which boat, with her tackle and apparel, was returned to the possession of the said Ed. F. Shields, upon his entering into bond, with security," &c.; and the bond, which was returned with the writ, signed by said Shields, J. B. Walker, Daniel Walker and others, was conditioned that the obligors should pay, or cause to be paid, to the said plaintiff, his heirs, &c., "such judgment as may be rendered in such attachment proceedings, and shall further pay all costs that may accrue on the trial of the same."

At the Fall term, 1852, of the Circuit Court, the plaintiff filed his declaration, in which he "complains of Edward F. Shields, Jacob B. Walker, and Daniel Walker, claimants and owners of the steamboat called and named Farmer, which were attached to answer the said plaintiff in a plea of trespass on the case." The declaration contains two counts, of which the first alleges, that plaintiff, at the time of the alleged collision, which was in April, 1852, was the owner of seventy-eight bales of cotton, which were shipped and freighted on a flat-boat, belonging to Wm. McCullough and Alex. Brame, then afloat in the Mobile river below the junction of the Tombeckbe, and bound for Mobile; that the defendants were, at the same time, possessed of the said steamboat," and then and

there had the care, direction, and management thereof; yet the said defendants, not regarding their duty in that behalf," &c., "took so little and such bad care of their said steamboat, in the direction and management of the same, that the said steamboat, by and through the carelessness, misdirection, and mismanagement of the said defendants, then and there, with great force and violence, ran against the said flat-boat, with the said seventy-eight bales of cotton of said plaintiff, and thereby greatly broke, damaged, and injured the said flat-boat, and thereby the said seventy-eight bales of cotton of said plaintiff, then on board of said flat-boat, became and were greatly wetted, damaged, and injured," &c. The second count alleges, that, at the time of the collision, the defendants were possessed of the said steamboat, "and the said Edward F. Shields, as commander and captain, had the care, direction, and management of said steamboat; yet, not regarding his duty in that behalf," &c., "took so little and such bad care of the said steamboat, in the direction and management of the same, that the said steamboat, by and through the negligence, carelessness, and mismanagement of the said Edward F. Shields, commander and captain as aforesaid, then and there, with great force and violence, ran against the said flat-boat," &c.

The defendants craved oyer of the attachment, and demurred to the whole declaration, and also to each count separately; but their several demurrers were overruled. They then pleaded, 1st, not guilty; and, 2d, "that the running of the said steamboat against the said flat-boat, whereby the cotton of plaintiff, on board said flat-boat at the time, was injured, if injured at all, was caused partly by the fault, mismanagement and imprudence of the person or persons who had the direction and control of the said flat-boat, and not wholly by the mismanagement, or misdirection, or negligence, or carelessless, or fault of the person or persons who had the direction and control of the said steamboat at the time of the alleged trespass or injury." The court sustained a demurrer to this last plea, and the defendants then, by leave of the court, pleaded, "in short by consent," "that the negligence and imprudence of the person or persons who had the control and direction of the said flat-boat, on which the

plaintiff's said cotton was shipped and freighted at the time of the alleged injury to said cotton by the running or striking of said steamboat against said flat-boat, caused or contributed to the said collision between said boats, whereby the injury to plaintiff's cotton, as alleged in his declaration, if injured at all, was done"; and to this plea, also, the court sustained a demurrer. The defendants also filed a plea *puis darrein continuance*, in which they set up a recovery against the steamboat by the owners of the flat-boat, "which judgment (they aver) remains in full force, not having been set aside, or reversed, or in any manner annulled; and defendants aver, that the said attachment and judgment were and are for the injuries committed by the running or striking of the said steamboat against the said flat-boat, and are the same injuries which are in the plaintiff's declaration alleged to have been done to the said cotton of the said plaintiff; and so defendants say, that plaintiff ought not to recover in this case against defendant, for the reason that the recovery has been had against said steamboat for the said injuries in the plaintiff's declaration complained of." The plaintiff demurred also to this plea, and his demurrer was sustained.

On the trial, the defendants moved the court to strike the declaration from the files, on the ground that it was a departure from the writ of attachment; but the court overruled their motion, and the defendants excepted.

The plaintiff introduced one Wm. McCullough as a witness, who stated, on his *voir dire*, "that he was one of the owners of the flat-boat which was injured, and had command of it at the time of the collision; that he had given a bill of lading, or receipt, to the owners of the cotton, for the cotton on board the injured flat, and was to receive one dollar per bale for freight of the cotton to Mobile; and that he had a suit against these same defendants, pending in this court, for cotton of his own that was on the flat-boat and injured by the collision. On these facts appearing, it was objected by the defendants that said McCullough was incompetent from interest as a witness for plaintiff; but the objection was overruled, and the witness allowed to testify, and thereupon the defendants excepted."

The testimony in the case, which is all set out in the bill of

exceptions, is very voluminous; but, as no question was reserved touching any part of it, a brief statement of its substance, sufficient to explain the charges refused, is all that is necessary. On the part of the plaintiff, the following witnesses were examined, viz., Wm. McCullough, who was the commander of the flat-boat at the time of the collision; Nichols, Kinnard, and Zimmerman, who were all employed as hands on the flat-boat at that time; John Saunders, who was on board the Farmer at the time of the collision, and was looking out for the flat-boats at the time, as he had friends on them; and Sam'l Chesnut, who was in command of another flat-boat which was lashed broadside to the flat on which plaintiff's cotton was at the time of the collision. According to the testimony of these witnesses, the circumstances of the collision were as follows: The two flat-boats, which were loaded with cotton and lashed broadside together, were floating down the Mobile river, between eight and nine o'clock at night, about a mile below the point where the Tensaw river shoots off; the river was about two hundred yards wide at that point, and very crooked; the night was dark and cloudy, and a heavy rain fell soon after the collision; the steamboat was heard approaching some twenty or thirty minutes before she came in sight, and lighted torches were then placed at the outer corners of the flat-boats; when the steamboat first came in sight, she was from two to three hundred yards distant from the flats, and seemed to be moving very rapidly; the flats were in the middle of the river, but there was room enough on either side of them for the steamboat to pass; the steamer Lowndes, which had passed the Farmer a short time before, had just passed them without touching; the Farmer attempted to pass on the right side, but her wheels struck the corner of the outer flat, on which plaintiff's cotton was; on hearing the cry for help, the steamboat rounded to, and returned, and, after carrying the flat to the shore, spent the night in taking off the cotton and picking up what had fallen overboard.

The defendant's witnesses were, one Agee, who was a passenger on the Farmer at the time of the collision; Stewart George, who had been a pilot on the river for thirty years; S. P. George, who had been a steamboat pilot for three years,

and was pilot of the Brooklyn on the night of the collision, and came up with the Farmer soon after the accident had occurred; Charles Bell, and one Clayton, who had been on the river for several years as clerks on steamboats; Levi Cobb, who was one of the engineers of the Farmer; W. H. Pendarvis, who had been on the river as a pilot for thirty years, and was on the night of the collision the captain of the Sarah, which passed up the river soon after the occurrence; John Newton, first mate of the Farmer; William Holland, watchman; Walter C. Tuggle, who was in the pilot-house assisting the pilot; Alexander Shelton, who was at the helm; and James R. Ingram, who had been running the river as clerk and captain for eight or nine years. The testimony of these witnesses was, substantially, as follows: That the Farmer, at the time of the collision, had her full complement of officers and men, who were skilful and competent; that she was running at her usual speed, and was not racing with the Lowndes; that the Mobile river, for several miles below the point where the Tensaw shoots off, is very narrow, crooked, and difficult to navigate—its width at the point where the collision happened variously estimated from one hundred to one hundred and fifty yards; that the night was very dark and cloudy; that every effort was made by the steamboat, so soon as the torches were seen, to avoid the collision; that the collision was very slight, and was not sufficient to sink or injure a flat-boat of ordinary strength; that the timbers of the injured flat were not more than one-half the usual thickness, and the boat was not built as strongly as flat-boats usually are; that it is the usage and custom of flat-boats, on account of the risk and danger of navigating that part of the river by night, to tie up to the bank above the point where the river divides; that the danger is much increased by lashing two flat-boats broadside together, as it makes them more unmanageable, and leaves less space for boats to pass them; that all the steamboats navigating the Mobile river, ascending and descending, pass this narrow part of it at night, and on the night of the collision four boats passed.

To rebut a portion of the defendants' evidence, the plaintiff re-examined McCullough, Chesnut, and Kinnard, who testified, that they knew of no custom requiring flat-boats to tie

up to the bank for the night before entering the Mobile river, and had never done so themselves; and that the planks of the injured flat-boat were of the usual strength and thickness. It was proved, also, that Edward F. Shields, one of the owners of the Farmer, had command of her as captain at the time of the collision; that the plaintiff was the owner of the cotton sued for; its value; the amount of damage, &c.

On this proof, the defendants asked the following charges:

"1. If the jury believe from the evidence that the danger and risk of collision were increased by lashing the two flat-boats together, and that this contributed to the collision whereby the boat on which plaintiff's cotton was shipped and freighted was wrecked, then plaintiff cannot recover for any damage he may have sustained by the collision of the boats.

"2. If, at the time of the collision, the steamboat had a sufficient number of skilful and competent officers, and a proper and sufficient crew for the proper management of the boat; and if the officers and crew used ordinary care, prudence, and diligence to prevent and avoid a collision with the flat-boat,—then defendants are not liable for the consequences of the collision.

"3. If the jury believe from the evidence that the two flat-boats were lashed together, and thereby occupied a wider space in the river than was necessary, and that thereby the facility for the passage of steamboats safely was diminished, and the risk of collision increased; and that the lashing of the two flat-boats together did, in this case, increase the risk and danger of collision with the steamboat Farmer; and that, if the flat-boats had not been lashed together, the collision with the steamboat would have been avoided,—then the plaintiff is not entitled to recover.

"4. If the evidence shows that those who had the control and direction of the flat-boat on which plaintiff's cotton was, lashed it side by side with another flat-boat, and permitted the two flat-boats thus to float, on a dark night, in a narrow and crooked part of the river, where many steamboats were known to the managers of said flat-boats to be in the habit of passing at night, the managers of said flat-boats would be chargeable with a want of proper care and prudence, and the defendants would not be chargeable with the consequences of

the collision of said flat-boats with the steamboat, if the officers and crew of the steamboat exercised ordinary care and diligence to avoid and prevent the collision.

"5. If the jury believe from the evidence that one of the owners of the steamboat Farmer was on board of her, and in command of the boat as master at the time of the collision, then the plaintiff is not entitled to recover in this action.

"6. If the jury believe from the evidence that the night was very dark and cloudy, and that on such nights it was customary or the usage of flat-boats to tie up in the river above where the collision occurred; and that the failure of the flat-boats to do so contributed to the collision,—then the plaintiff is not entitled to recover."

The court refused each one of these charges, and the defendants excepted to each refusal.

The jury having returned a verdict for the plaintiff, assessing his damages at $705 59, the court thereon rendered judgment "that the said steamboat Farmer be condemned to the satisfaction of the plaintiff's debt and demand;" and further, "that the said plaintiff recover of and from the said Jacob B. Walker, Daniel Walker, Joseph Hunter, Moses Waring, and Stephen Twelves, the said sum of $705 59, the sum assessed as aforesaid, and the costs in this behalf expended."

The rulings of the court on the several demurrers, the refusal to strike the declaration from the files, the overruling of the objection to the competency of McCullough as a witness, the refusals to give the several charges requested, and the rendition of the judgment, are now assigned for error.

J. W. LAPSLEY, for the appellants:

1. The court erred in refusing to strike the declaration from the files. The plaintiff should have declared against the steamboat, and not against her owners. The statute, under which the action was instituted, only authorizes a proceeding *in rem*, and not *in personam*; and the declaration must follow the process.—1 Chitty's Pl. 279, 283; Otis v. Thorn, 18 Ala. 395. If the obligors in the bond should have been made defendants, still the declaration is defective: it does not conform to the bond, but omits several of the obligors.

2. The court erred, also, in overruling the demurrer to the

attachment and declaration. This assignment, in addition to the question presented by the first, raises this further question, Is there any authority for the action, either at common law, or by statute? The act of 1844 is void for uncertainty, and is an absurdity. It is a bundle of incongruities and absurdities: it makes no distinction between the parties who are in the right and those who are in the wrong, but gives a remedy to the owners of the injured boat, whether guilty or not; it does not provide against whom the declaration shall be filed, or who shall be parties defendant—whether, like a proceeding in admiralty, it shall be against the boat, or against her owners, or against the obligors in the bond; if no bond is given, it makes no provision for the disposition of the boat before or after the determination of the suit. If it is a proceeding *in rem*, it makes no provision for the release of the obligors in the bond after they have paid the value of the boat, but only provides that they may, upon application to a circuit judge, pay the value of the boat, and that the same shall be divided, *pro rata*, among the several suitors or judgments; but it does not provide that the obligors shall be thereby released. What, then, does it mean? Is it a proceeding *in rem?* or *in personam?* or both? It is a nondescript, without sense or meaning, and is therefore void.

3. The court erred, also, in the rendition of judgment. The statute does not authorize a judgment against the owners of the boat, nor against the obligors in the bond: it only authorizes an execution to issue on the bond.

4. The court erred, also, in sustaining the demurrers to the second and third pleas, which allege that the collision was partly caused by the fault, negligence, and mismanagement of those who had charge of the flat-boats. In maritime law, if both vessels are in fault, each must suffer its own loss, and the damages may be apportioned. The well-settled rule at common law is, that there can be no recovery when the plaintiff's boat was in fault in any degree; and the court will not measure the degree of fault of the suffering boat. If there was any fault on the part of the plaintiff, and that fault contributed in any degree to the act which produced the injury, there can be no recovery. This is the well-established doctrine of the English courts, the Supreme Court of the United

States, and the courts of the different States.—Butterfield v. Forrester, 11 East 60; Pluckwell v. Wilson, 5 Car. & P. 368; Woolf v. Beard, 34 E. C. L. Rep. 435; Barnes v. Cole, 21 Wend. 188; Hartfield v. Roper, *ib.* 615; Rathbun & West v. Payne, 19 *ib.* 399; Spencer v. Utica & Schenectady Railroad Co., 5 Barb. 337; Brand v. Troy & Schenectady Railroad Co., 8 *ib.* 369, 383; Drew v. Steamboat Chesapeake, 2 Doug. (Mich.) R. 33; Brown v. Maxwell, 6 Hill (N. Y.) 592; Aurora Railroad Co. v. Grimes, 13 Ill. 585; Lane v. Crombie, 12 Pick. 177; 4 McLean's R. 291; 12 Shep. 39; 10 U. S. Dig. 394; Angell on Carriers, §§ 556, 633, 635, 643, 645. If the owners of the boat cannot recover on account of the fault on their part, neither can the shippers; for, clearly, the obligation of the steamboat or its owners to shippers on the flat-boat cannot be greater in degree than to the owners of the flat-boat. The liability must be the same: the owners or managers of the flat were agents of the shippers in this matter. The shippers have another remedy, viz., an action against the owners of the flat-boat as common carriers; and that remedy is very ample. The carrier is an insurer against everything but the act of God and the public enemy.—Angell on Carriers, § 148. The liability of the owners of the flat-boat to the shippers of the cotton, under the evidence set out in the record, cannot be doubted.

5. The court erred, also, in sustaining the demurrer to the plea of a former recovery by the common carriers of the cotton. The recovery was alleged to have been before a court of competent jurisdiction, for the injuries alleged and complained of in this case. Whether the recovery was by the plaintiff in this case, or by another party competent to sue, can make no difference in principle: one recovery for the same matter is all that the law permits. The owners of the flat-boat were competent to sue for and recover all injury done the cargo.—Story on Bailments, p. 144, § 148; Parsons on Cont., p. 633. As to former recovery or adjudication, see Pinny v. Barnes, 17 Conn. 420; George v. Gillespie, 1 Iowa R. 421; 9 Humph. 342; Thompson v. Winfield, 1 Miss. 243; Pender v. Felts, 2 S. & M. 535; Cummings v. McGehee, 8 Port. 349; O'Neal v. Brown, 21 Ala. 482; 3 C. & H.'s Notes to Phil. Ev. 830; 1 Greenl. Ev. §§ 522, 528.

6. The captain and part owner of the flat-boat was not a competent witness for the plaintiff, and the court therefore erred in overruling the motion to exclude him. A recovery by the plaintiff in this case will be a protection to the owners of the flat-boat, and the record in this case would be evidence for them in any suit afterwards brought against them by the plaintiff; he is, therefore, directly interested, and of course incompetent.—Otis & Jayne v. Thom, 23 Ala. 469.

7. As to the charges requested: The first asserts the principle embraced in the second and third pleas, as to which see authorities cited *supra*. The refusal of the second charge was equivalent to charging the converse of it, viz., that extraordinary diligence was required on the part of the steamboat, under the circumstances; and this, too, when the managers of the flat-boats were highly culpable. This is not the law: the owners of the steamboat discharged their duty, in providing a sufficient number of competent officers and men; and if the officers and men used that care and diligence which competent officers and men, engaged in the same business, are accustomed to exercise under similar circumstances, this will excuse the owners, and is all the law requires. Of course, their responsibility is greater in their character of carriers. The legal presumption is, that the master of a vessel will do what is right, and will follow the regular and correct course of trade.—Angell on Carriers, § 643. The third charge asserted, in effect, that if the collision was brought about directly or indirectly by the unskilfulness and mismanagement of those who had charge of the flats, the owners of the steamboat were not responsible; and this analysis, it is believed, demonstrates its correctness. The fourth charge asserts, in substance, that if those who had charge of the flat-boats acted in a manner which necessarily increased the risk and danger of a collision with steamboats, and the officers and crew of the steamboat exercised ordinary care and diligence to avoid a collision, her owners would not be responsible. Ordinary care—that is, such care as the generality of persons engaged in the same business are accustomed to exercise—is all the law requires in ordinary cases; and *a fortiori*, it ought to be held sufficient against a party who is guilty of gross negligence. The fifth charge contains a proposition relating to

the pleadings; and the sixth asserts a principle similar to that contained in the first and second, somewhat modified and varied in the statement. As to all these charges reference is made to the authorities above cited. Charges will be construed in reference to the proof.—Perry v. Hardman, 12 Ala. 604; Lockwood v. Nelson, 16 *ib.* 294. The steamboat, so far as the proof discloses, was not at all in fault; no want of care or diligence on her part is shown, but rather the contrary; while the flat-boats are shown to have been in fault in several particulars. Want of care and diligence will not be presumed, but must be proved.—Parsons on Contracts, p. 606; 7 Humph. 134.

WM. M. MURPHY, *contra:*

The case at bar is distinguishable from that of Otis v. Thorn, 18 Ala. 395, which is relied on to sustain the first three assignments of error. That case decides, that, "after the issuance of an attachment against the steamboat, the proceedings should so far conform to the nature of the admiralty practice, as that the declaration be filed against the boat itself, and not against the owners, and the owners be allowed to intervene and make themselves parties, if they desire to do so." In that case, there was no proof of ownership; in the case at bar, the ownership is admitted: the owners did intervene, made themselves parties, and defended the suit. The declaration is against the boat; the parties are brought into court by the proceeding against the boat; and the proceedings are assimilated as nearly as may be to the admiralty practice. The fourth section of the act provides, that "the declaration and subsequent proceedings shall conform to an action on the case for the injury." It is believed to be impossible to obey this act and yet conform entirely to the admiralty practice: there is no such proceeding known to admiralty as an action on the case, and none known to the common law as an action on the case, a proceeding *in rem*. The attachment is *in rem*; but when it is executed, and bond given, the declaration and subsequent proceedings must be *in personam*. The "subsequent proceedings," are, the plea, verdict, and judgment. Every word in this declaration *in personam* may be stricken out, and yet a good declaration against the steamboat will remain.

The second and third pleas are bad. They are irrelevant, and the evidence to sustain them would be irrelevant. The only issue was, whether the collision took place through the fault of the steamboat; if it did, the owners are responsible. Otis & Jayne v. Thom, 23 Ala. 469. These pleas may be true, and yet the steamboat may be in fault; and pleas admitting of two constructions must be construed most strongly against the pleader.—Lacy v. Holbrook, 4 Ala. 88. These pleas are also bad for uncertainty.—1 Chitty's Pl. 539.

The fourth plea, which sets up a former recovery by the owners of the flat-boat, is also bad, because the recovery is not between the same parties, nor their privies. There is certainly no privity between the plaintiffs in that suit and the plaintiff in this: both have separate and independent rights of action for their respective injuries.—Davidson & Stringfellow v. Shipman, 6 Ala. 30; 1 Stark. Ev. 191; Duchess of Kingston's case, 20 State Trials.

McCullough was admitted to testify under section 2302 of the Code. The case of Otis & Jayne v. Thom, *supra*, decides the law of evidence before the adoption of the Code, and is founded upon section 396 of 1st Greenleaf's Evidence, which expressly asserts, that the record would be no evidence against the servant or agent who was called as a witness. The trial in this case was had since the adoption of the Code, and the witness does not come under the exceptions enumerated in section 2302.

GOLDTHWAITE, J.—The first question is upon the action of the court in refusing to set aside the declaration. The attachment was issued under the act of 17th January, 1844, (Acts 1843-4, 98,) and directs the sheriff to seize and take possession of the steamboat Farmer, with her tackle, apparel, and furniture, and to keep and retain the same in his possession, to answer to the judgment which may be rendered, unless the master, owner, or some other person for them, enter into bond, &c. The first count of the declaration "complains of Edward W. Shields, Jacob B. Walker, and Daniel Walker, claimants and owners of the steamboat called the Farmer"; and alleges that they had the care, direction and management of the same, and that by the carelessness and misdirection of

"said defendants in the management of said steamboat, she ran into the flat," &c. The second count differs from the first, only in alleging that "the said Shields, as commander and captain, had the care and management of the steamboat, and that the flat was run into by his carelessness and misdirection." We have referred particularly to the declaration, in order to show that it is against the parties named therein, as defendants, and not the boat itself; and this being the case, it falls directly within the decision of this court in Otis v. Thorn, 18 Ala. 395, where the attachment was issued against a steamboat under the same statute, and the declaration was against two of the obligors in the replevy bond, as owners. The defendants moved the court to set aside the declaration, which was refused, and the correctness of the action of the court in this respect was the question on error. It was held, that the declaration must be against the boat itself, and not the owners; and that the refusal of the court to set aside the declaration, was a reversible error. It is supposed, however, by the counsel for the appellees, that the fact that the defendants are admitted by the affidavit, on which the attachment issued, to be the owners of the steamboat, and by the attachment bond, which is payable to them as such, takes the case at bar out of the influence of the decision to which we have referred. But we do not think so. The ground on which it rests is, that the act of 1844 gave the remedy against the boat alone, and, although persons interested as owners would have the right to intervene and defend, the declaration must be, in conformity with the process and object of the statute, against the boat, and not its owners. There is no difficulty in framing a declaration to meet this decision. It should complain of the boat itself, and allege the injury to have been done by it, through the carelessness and negligence of those having its direction and management. It would be unnecessary, in view of the purpose of the statute, and the judicial construction it has received, to state the names of the persons whose carelessness caused the vessel to commit the injury, although the naming of them would not be objectionable. Any of the owners would have the right to come in and defend the suit; and, by analogy to the practice in admiralty, this should be done by application to the court, stating that the applicant is

interested in the steamboat seized, as owner, and should be sworn to by him if within the State, and not at an inconvenient distance,—otherwise, by his agent (The Adeline, 9 Cranch 244; Dunlap's Ad. Pr. 161-2); and an entry should be made upon the minutes of the court, admitting him to defend as owner.

As the proceedings, except so far as they are varied by the statute, must be governed by the rules of the common law, any facts which would defeat the action, had it been brought in case against the owners, will have the same effect when pleaded to this proceeding against the boat. The general rule of the common law unquestionably is, that if both vessels are to blame, neither can recover.—Vanderplank v. Miller, 1 M. & M. 169; Verrall v. Garner, 1 Cromp. & Mees. 21; Lack v. Seward, 4 C. & P. 106; Luxford v. Large, 5 *ib.* 421; Woolf v. Beard, 8 *ib.* 373; Kent v. Elstob, 3 East 18; Kennard v. Burton, 25 Maine 39; Broadwell v. Swigert, 7 B. Mon. 39; Rathbun v. Payne, 19 Wen. 399. But this rule must be understood with reference to faults which operated *directly and immediately* to produce the collision.—Cummins v. Spruance, 4 Harr. 315. Because a flat-boat runs at night, when she should not, or ties up in the wrong place, would not justify a steamboat in running into her, any more than a stage coach would be justified in wilfully or carelessly running over a man lying asleep in the road; and in all such cases, if the act causing the injury could have been prevented by the use of ordinary care, the failure to use it will render the party liable. There is no inflexible rule, either of the river or the road, the neglect of which by the one party will dispense with the exercise of common caution by the other.—Abbott on Shipping 238, and cases cited. But "ordinary care" is altogether a relative term; and in cases like those we have put, the want of it means nothing more than the failure to use those precautions which a just regard to the persons and property of others demands should be used under the circumstances of the particular case. Of course, a vessel not in fault would not be obliged, in order to escape a collision, to risk her own safety, or endanger the lives of her passengers; but she should at least use the best skill and judgment of her officers, and the employment of the means at their command, in order to

prevent the occurrence of any act fraught with peril to the lives and property of others.

Applying the principles we have laid down to the matter of the second and third pleas, it will be seen that they were both defective, for the reason, that the collision might have been remotely and partly caused by the imprudence and negligence of the flat running at night in a certain part of the river where it was unusual and dangerous for such boats to run, or by mismanagement in being fastened broadside to another flat; but we have already seen that neither of these circumstances would have excused the steamboat, if notwithstanding, she could, by the exercise of ordinary care on her part, have passed them without striking.

In relation to the fourth plea, there is no doubt that a common carrier, as he is not absolved from his liability to the owner of the goods by the torts of third persons, has the right to maintain an action against them for the wrong; and it is equally certain that a recovery and satisfaction by him, for the injury done to the goods, will be a bar to an action by the owner for the damage or loss from the same injury.—Story on Bail., § 585; *ib.* § 94. The plea here is artfully drawn, and seeks to escape the action, by setting out a recovery by the carrier, for the injury committed by the running or striking of the steamboat against the flat, which, it avers, "are the same injuries which the plaintiff's declaration alleges to have been done to the said cotton of the said plaintiff." But this is not equivalent to an averment that the recovery was for the effect of such injury upon the same cotton described in the declaration. *Non constat*, but that the former suit was for the damage done by the collision to the cotton of some other person on board the same flat. The demurrer was properly sustained to this plea also.

In admitting the evidence of the owner and person in charge of the flat, the court erred, for the reason, that a recovery in the action would have placed the witness in a state of security against any action the plaintiff might bring against him.—Otis v. Thom, 23 Ala. 469. It is urged, however, that he is made a competent witness by section 2302 of the Code. But if the law of the Code applied, which we do not decide, he would not be competent, as the verdict and judgment in the

suit in which he was offered, if in favor of the plaintiff, might be evidence in his favor in another suit against him by the same party (Farwell v. Hilliard, 3 N. H. 318; Gilmore v. Carr, 2 Mass. 171; Wetmer v. Slatter, 2 Rawle, per Huston, J.); and the section referred to expressly provides that the objection to the competency of a witness shall prevail in such a case.

The charges are easily disposed of. The testimony on which they were founded did not tend to show that the conduct of the flat was such as to contribute directly and immediately to the act of collision; and the sole question, therefore, under the law, was whether the steamboat used ordinary care to prevent it. The first, third, and sixth charges asserted, in effect, that the fault of one vessel, although not directly contributing to the collision, dispensed with the want of ordinary care in the other to prevent it, and were therefore properly refused. The second and fourth should have been given, as they made the liability turn on the question of ordinary care on the part of the steamboat; and in relation to the fifth, as the correctness of its refusal is not questioned, it is unnecessary to say anything.

Judgment reversed, and cause remanded.

PAULLING *vs.* WATSON.

1. The right to a perpetual injunction of a judgment at law founded on a gaming consideration, although the plaintiff therein is an innocent holder for valuable consideration, and no defence at law was attempted, is not affected by an erroneous decree of the chancellor dismissing the bill and dissolving the injunction; and if the collection of the money is afterwards coerced by execution, it may be recovered in an action for money had and received, if commenced within six years from the reversal of the decree on error and the award of a perpetual injunction.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. TURNER REAVIS.

This was an action for money had and received, and was commenced (by summons and complaint) on the 4th March, 1853. The facts of the case, as set out in the bill of exceptions, were as follows:

"At the March term, 1838, of the Circuit Court of Marengo county, Watson recovered a judgment against Paulling for the sum of $1130 80, founded upon a note dated September 17, 1836, made by said Paulling to one Rowland Edson, and endorsed by said Edson to Watson for a valuable consideration. No defence at law was made or attempted by Paulling. Watson seeking to collect the amount of his judgment by execution, Paulling filed a bill in chancery, praying that he might be enjoined from its collection, and alleging that the note was given for a gaming consideration—money lost at cards with Edson—which fact it is not charged was known to Watson. For the facts and proceedings had in this chancery case, reference may be had in the Supreme Court to the record of it there, and to the published report in 21 Ala. 280. The chancellor granted an injunction, and the case remained enjoined until the December term, 1850, of the Chancery Court of Greene, when the chancellor, upon the hearing of the case, dismissed the bill, and dissolved the injunction. Watson thereupon sued out a new execution, and proceeded to collect his judgment. After the issuance of this execution, to-wit, on the 31st day of March, 1851, and before the payment of the money thereon, Paulling sued out a writ of error upon the decree of the chancellor, returnable to the then next term of the Supreme Court, where the case was regularly continued until the 29th July, 1852. Paulling gave a writ-of-error bond on suing out this writ of error, but the injunction was not re-instated, nor was a new injunction obtained; but Paulling applied for an injunction to a circuit-court judge, pending the period the case might remain in the Supreme Court, which was refused. The sheriff proceeded under the execution to collect the debt, interest, and costs from Paulling, and on the 20th May, 1851, paid over to Watson the sum of $2319 63, in full of debt and interest, and the sum of $26 43 court costs; and $63 20 was collected as commissions to the sheriff, but neither of these last two sums was paid to Watson. After the receipt of this amount by Watson, to-wit,

on the 29th day of July, 1852, the Supreme Court reversed the decree of the chancellor, and rendered a decree that said judgment be perpetually enjoined; and in a few weeks afterwards Paulling wrote to Watson, demanding the repayment of the money which had been collected from him by said execution; and Watson replied, that he would examine the opinion of the Supreme Court, and ascertain if he was liable, and if he concluded that he was, he would pay without suit. In reply to a letter from Paulling's attorney, dated February 2, 1853, he replied, that he would not pay. This suit was commenced at the first term to which a suit could be brought after notice that he would not pay; and the summons was issued on the 4th March, 1853.

"This was, in substance, all the testimony on both sides; and the court charged the jury, that upon this testimony the plaintiff was not entitled to recover; to which charge the plaintiff excepted."

No errors are assigned on the record.

J. R. JOHN, for the appellant:

When a judgment is reversed, the rights of the parties are immediately restored to the same condition in which they were before its rendition, and the judgment is said to be mere waste paper.—Dupuy v. Roebuck, 7 Ala. 484; Simmons, adm'r, v. Price, adm'r, 18 *ib.* 405; Price v. Simmons, adm'r, 21 *ib.* 337; Williams v. Simmons, 22 *ib.* 425.

If the above position be true, then the injunction which the chancellor dissolved, being restored by the judgment of reversal of this court, must be considered as continuing, as between the parties, all the time from its first service; consequently Watson collected the money wrongfully. Collecting the money by a nominal legal right, which has been swept away from him by the decree of reversal, he cannot retain it. Williams v. Simmons, 22 Ala. 425.

Watson shows no right to collect the money from Paulling, except the naked right given him by the judgment in the Circuit Court of Marengo, which has been taken from him by the decree of reversal of this court, and is as if it never existed. Coercing the money without right, he cannot be permitted to retain. He retains, if at all, by virtue of right

arising from, or out of, or connected with the reversed judgment. None of these things exist in this case. His security (the note) and judgment were void, and the decree of the chancellor vacated.

The foregoing positions are also fully sustained by analogy drawn from the law applicable to real estate. A party unlawfully dispossessed, so soon as he is restored to possession, is regarded as continuing in possession all the time, and consequently may maintain trespass for injuries to the premises, as though he had been in the actual possession all the time of his disseizin.—Morgan v. Varick, 8 Wend. 587, 591; Dewey v. Osborn, 4 Cow. 329, 338.

Watson stood on what he insists were his legal rights in collecting the money from Paulling, Paulling resisting; and if he collected without legal right, as he certainly did, if the judgment of reversal restored the parties to all the rights which existed between them at the time of the rendition of the reversed judgment, then Watson cannot retain, but must refund.—Williams v. Simmons, 22 Ala. 431; Sturgis v. Allis & Lee, 10 Wend. 354.

Watson asserts a right to the money collected of Paulling through and by virtue of a gaming security—a judgment founded on a note given to secure the payment of money lost at a game of cards. This security is utterly void. It can give him no right to collect, nor can it give him a right to retain. The fact that he has the money cannot give it validity sufficient to retain.—See Clay's Dig. 257, § 1; Finn & Dulaney v. Barclay, 15 Ala. 626.

Money paid on a gaming security may be recovered back, for the reason that the security is utterly void. This was money coerced by means of a gaming security, and not voluntarily paid, and therefore can be recovered back by this action.—1 Story's Eq. Pl. 324, § 304; Fon. Eq., b. 1, ch. 4, § 6, note c.

There is a well-defined distinction taken between illegal contracts executed and unexecuted. If an illegal contract (gaming for instance) be voluntarily and fully executed, in some cases an action will not be sustained for the recovery of the money back which has been actually paid. The courts leave the parties to the illegal contract where they voluntarily

place themselves. This is the extent to which the cases of Tindal v. Childress & May, 2 Stew. & P. 250; Windham, use &c. v. Childress & Skanes, 7 Ala. 357, and Samuels v. Ainsworth, 13 *ib.* 366. All these are cases of voluntary and full execution of the illegal contract by the actual payment of the money or thing won. They go no further, and it may be doubted on good authority whether they are correct.—Story's Eq. 323-4, §§ 303-4, and Foreman v. Hardwick, 10 Ala. 325.

But if the contract has not been thus fully and voluntarily executed, money may be recovered. Money may be recovered back from a stake-holder by a simple notice not to pay to the winner, as in the case of Woods v. Duncan, 9 P. 227. If a simple notice be sufficient, filing a bill, &c., certainly is sufficient to show that the party disaffirms the contract, and to authorize a recovery.—Foreman v. Hardwick, 10 Ala. 325. Paulling resisted all the time, and occupies a better ground than the parties in either of these last cases.

This is not a case of voluntary payment of money lost at play. It might therefore be admitted that money lost at gaming, if paid, could not at common law be recovered back; and further, that money lost at play and voluntarily paid, could not be recovered back under the statute of 1807; for this was a coercive payment by means of a gaming security, and therefore Story's position is correct on this point, and fully covers this case; and he is fully sustained on this point by the note c in Fonb.—1 Story's Eq., § 304.

An injunction is granted and perpetuated because from the facts,—whether they arise out of a statute or otherwise,—it is against conscience and law that the party should proceed. 2 Story's Eq. 194, § 875; 3 Dan. Ch. P. 1810.

If the above position be true, how can a party who does proceed thus contrary to equity, conscience, and law, and by such proceeding and by no other right collect money, claim to hold it on the ground of equity and good conscience? But this is a still stronger case; here the injunction, being perpetuated by relation, operates from its service on Watson.

After the erroneous dismissal of the bill and dissolution of the injunction, Paulling had no certain and well-defined remedy by which to prevent the collection of the money; and certainly he cannot suffer because of the improper action of

the court, nor can Watson acquire any right by that improper action. He is held to know that his judgment was void, and that the dissolution of the injunction was erroneous.—Carpenter v. Garrow, 4 Stew. & P. 336; Boren v. Chisholm, 3 Ala. 513; *Ex parte* Sanford, 5 *ib.* 562; Griffin v. Bank at Huntsville, 9 *ib.* 201. These cases show that Paulling could not arrest the execution. He made an effort and failed. Did he not do all he could do to prevent the final execution of the illegal contract?

The decree of this court perpetuating the injunction operates, as between the parties to it, and upon their rights, in the same manner and to the same extent, as though it had been rendered on the day the chancellor dismissed the bill and dissolved the injunction. This court does just what the chancellor should have done, and the decree of this court operates on the rights of the parties just as if the chancellor had perpetuated the injunction, instead of dissolving it; the injunction, in legal contemplation, operating by relation from its service as though it had never been dissolved.—Sturgis v. Allis & Lee, 10 Wend. 354; Duncan v. Kirkpatrick, 13 Serg. & R. 294; McJilton v. Love, 13 Ill. 494.

R. H. Smith, *contra:*

The ground of the action is, that plaintiff, after the money was paid, and more than six months before suit brought, obtained an injunction against paying it; and the other facts are, that he was prosecuting a suit for an injunction when the money was collected by legal process lawfully pursued. The injunction was purely statutory: no jurisdiction was shown in the case, except that under the statute, and without regard to laches in suffering judgment. The power under the statute then was, simply to enjoin the judgment as it was when the decree of the Supreme Court was rendered. The power to recover back the money was another distinct statutory right, confined to the winner, and limited to six months from the payment. If it had been shown, in the progress of the cause, that the money had been lawfully collected, the court would have possessed no power to order it to be restored.—2 Bibb's Rep. 4. Can the indirect effect of an injunction be greater than could have been given directly by a decree?

But the money could not have been recovered of Watson, under the statute, within six months, he not being the winner. The statute so confines the right on its face; all the authorities so limit it; and the plaintiff admits this in his argument. As between Paulling and Watson, the latter stands on the higher ground of equity. For public policy (not out of favor to the criminal loser) the collection of the money might have been resisted in a particular manner; but Paulling has, by the commission of a crime, induced an innocent man to part with his money for the paper, who has lawfully, and by reason of Paulling's laches, obtained a legal advantage, of which no court will deprive him in favor of Paulling. If the parties were *in pari delicto*, the legal advantage fairly gotten might be retained.—2 Burr. 1005; 3 *ib.* 1354; 6 Mass. 381; 6 Cowen 431; 3 Pick. 446; 6 Mass. 84; 11 *ib.* 368.

Watson has not only a better standing in court for this reason, but the plaintiff has also lost his position by neglect: he had no injunction, but could have got one; he neglected to do so, and lost by his neglect. He had a day in court, and full means at command to pursue his advantage; but he did not, and he now sues to redress his loss arising from his own neglect.—3 Ala. 513; *ib.* 458; 9 *ib.* 201; 4 S. & P. 336; 3 Dan. Ch. Pr. 1611, and authorities there cited; 3 Paige 381; 7 Johns. 295.

The effect of the injunction simply was to restrain: it could not act on the past, and undo what had been lawfully done. Its effect is, to prevent an act from being done; its field of operation is the future. Its object is preventive and protective: it seeks to prevent a premeditated wrong, rather than to redress an injury already done.—2 Bland 461; 3 *ib.* 63; 2 Story's Eq. § 862. In cases like the present, the injunction is expressly limited by the statute to enjoin judgments at law.—Clay's Dig., p. 350, § 28. At the time the perpetual injunction was decreed by the Supreme Court, there was nothing upon which it could operate: the money, the collection of which it restrained, was already in the possession of Watson, and the judgment was satisfied.

When a judgment has been recovered before a competent court, the party paying that judgment shall not recover back the money in another action while the judgment remains in

force.—1 Root's R. 120; 7 Greenl. 45; 17 Mass. 394; 3 Conn. 461; 1 Pick. 439; 3 Day's R. 36. The judgment upon which Paulling paid this money is still in force. The injunction having been dissolved, the plaintiff (Watson) was at liberty to pursue his judgment, and collect his money under execution. The appeal did not have the effect of re-instating the injunction.—3 Ala. 513; 9 *ib.* 201; 4 S. & P. 336; 7 Johns. 295.

RICE, J.—Under the act of 1807, (Clay's Dig. 257, § 1,) a note, or other security, given in consideration of money won at gaming, is void,—even in the hands of an innocent holder for a valuable consideration.—Manning v. Manning, 8 Ala. 138.

The act of 1812 (Clay's Dig. 350, § 28) provides, that the courts of equity shall have jurisdiction in all cases of gambling consideration, so far as to sustain a bill for discovery, or to enjoin judgments at law. Under this act, a court of equity is bound to entertain a bill, seeking to enjoin a judgment at law, which has been rendered on a security given for a gaming consideration, although the complainant in such bill could have defended himself at law, but did not do so. If such bill is filed in the proper county against the plaintiff in such judgment, before the collection of the money, the right of the complainant to a perpetual injunction of the judgment, when the facts alleged in the bill are admitted or proved, is a right given by statute, and is not dependent upon his giving any bond, nor upon the infallibility of any chancellor. The error of a chancellor in dismissing such bill cannot permanently despoil the complainant of his right to a perpetual injunction, nor of the substantial benefits lawfully resulting from such injunction. If the chancellor, by such erroneous decree, temporarily deprives the complainant of his money, by enabling the plaintiff in the judgment to coerce it from him by execution, the reversal of that decree by the Supreme Court, accompanied with the award of a perpetual injunction, restores to the complainant both the legal and equitable right to the money.—Finn v. Barclay, 15 Ala. 626; Knox v. Abercrombie, 11 *ib.* 997; Williams v. Simmons, 22 *ib.* 425.

A decree, duly obtained under the act of 1812, above cited, perpetually enjoining such judgment, is, as between the parties to it, a conclusive ascertainment that the judgment was

founded on a gaming security, and that the plaintiff therein not only had no right to issue his execution, but that his judgment (in the language of the act of 1812) is "utterly void and of no effect, to all intents and purposes whatsoever."—McCall v. McRae, 10 Ala. 313, and the cases cited above.

Money collected by execution under such judgment before it was perpetually enjoined, but after the plaintiff therein had been made a party to the bill filed to obtain such injunction, may be recovered back in an action for money had and received, commenced at any time within six years after the injunction was made perpetual.—Williams v. Simmons, 22 Ala. 425; Knox v. Abercrombie, 11 *ib.* 997.

Upon the facts stated in the bill of exceptions, the appellant is clearly entitled to recover, and the court below erred in charging that he was not thus entitled. For this error, the judgment is reversed, and the cause remanded.

JENKINS *vs.* McCONICO, ADM'R, &c.

1. A deed of gift, executed in Virginia in 1824, conveying certain slaves, in consideration of natural love and affection, to the grantor's daughter, then a married woman, "and the lawful heirs of her body," contained this clause—"I do bind myself, my heirs, &c., *to make to the above named property a clear and undoubted a right, as much so as can be made by word or deed, from the claim and claims from every person or persons whatsoever*, to my said daughter and her lawful heirs as above mentioned": *Held*, that the deed created a separate estate in the wife, and excluded the husband's marital rights.
2. If a party reads in evidence to the jury a certified copy of a deed which purports to have been executed by husband and wife, without any attempt to limit its effect as proof, he thereby concedes its genuineness, and cannot be heard, in an appellate court, to say that it was not proved; although, according to the memorandum endorsed on it by the clerk of the court in which it was recorded, it was admitted to record on the acknowledgment of the husband alone, and the party against whom it was offered "admitted that the original had been executed, proved, acknowledged, and recorded, as endorsed and certified on said copy."
3. Where personal property is conveyed directly to the wife, to her sole and

separate use, she and her husband may, by their joint deed, vest the legal title in trustees for their use and the use of the survivor for life; and the husband, surviving, may set up such deed to defeat an action of trover brought against him by the wife's personal representative.

4. An admission that a deed was executed implies that it was delivered, and a delivery of the deed dispenses with the necessity for a delivery of the property conveyed by it.

5. If the husband sell or dispose of the wife's separate personal property without her consent, express or implied, her right of action is suspended during coverture only: if she survive, she may sue his personal representative for the conversion; and if he survive, her personal representative may sue him.

6. In trover, when the thing converted has a fixed value, the true measure of damages is that value at the time of conversion, and the jury may give interest upon it; and if the value is fluctuating, the jury may take its highest value at any time between the conversion and the trial.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. ALEX. B. CLITHERALL.

TROVER (under the Code) by the appellee, as administrator of Mrs. Janette Jenkins, deceased, against her husband, Richard Jenkins, for the conversion of twenty-one slaves, which the plaintiff claimed, as the separate property of his intestate, under a deed of gift from her father, John Williams, of which the following is a copy:

"I, John Williams, of the county of Henrico, and State of Virginia, for the great love and affection I *bare* for my daughter Janett Jenkins, now the wife of Richard Jenkins, I give to her, the said Janett Jenkins, and the *lawfull* heirs of her body, the following property, as followeth, *to-witt:* four negroes, by the names of *Pheba*, Susan, Wilson, and *Moriah*, and their increase, forever; to the proper use and behoof of my daughter Janett Jenkins, and her heirs, as above mentioned. I do bind myself, my heirs, &c., to make the above named property a *clair* and undoubted a right, as much so as can be made by word or deed, from the claim and *claimes* from every *pursoit* or *pursons whatsever*, to my said daughter and her *lawfull* heirs, as above mentioned. Given from under my hand and seal this *tweelvth* day of February, 1824.

"In presence of "John Williams [seal]".
J. P. Camden,
Wm. Carter,
Mitchell W. Bradley."

"On the trial of the cause, on the plea of not guilty, the plaintiff read to the jury the following evidence:

"1. Interrogatories of the plaintiff to the defendant, and the defendant's answers thereto," which are, in substance, as follows: He was married to Janette Williams, the daughter of John Williams, in Henrico county, Virginia, on the 14th February, 1822; and at the time of their marriage, said John Williams was the owner of certain slaves, named Phebe, Susan, Wilson, and Maria. The original deed of gift, by which John Williams conveyed said slaves to said Janette, is not in his possession, nor does he recollect that he ever had it in his actual possession; it was admitted to record in the County Court of Henrico county, Virginia; believes the copy appended to the interrogatories to be a correct copy. The deed of trust from respondent and wife, hereinafter more particularly described, is not in his possession, nor under his control; the negroes Susan and Eliza, therein mentioned, are two of the slaves conveyed by said deed of gift from John Williams; "he supposes, seeing the copy appended, that he did execute the paper, but does not recollect having done so; he requires the paper to be duly authenticated and proved; does not know where the original is; does not know whether the said paper is or is not a correct copy of the paper of which it purports to be a copy, nor whether it was executed by the other parties thereto signed." He sold Maria in 1824 or 1825, and Wilson in 1827; Mrs. Jenkins did not unite in the bill of sale; all the other slaves are in his possession, or under his control; they are the same slaves, together with their increase, originally conveyed by said deed of gift; Eliza was born in May, 1824, and the children of Susan were born after the 12th February, 1824; a demand of said slaves was made before suit brought; said original deeds were executed, if at all, in Henrico county, Virginia, and respondent supposes are there recorded.

"2. The copies attached as exhibits to the interrogatories; which were admitted in evidence, in lieu of the originals, by consent of the defendant's counsel: and the defendant admitted, also, the originals of said copies had been executed, proved, acknowledged, and recorded, as endorsed and certified on said copies." The exhibits here referred to are as follows:

1. A copy of the deed of gift from John Williams, above set out, to which is appended the certificate of the clerk, in these words:

"In Henrico County Court, Clerk's Office, February 16, 1824. This indenture was proved by the oaths of J. P. Camden, Wm. Carter, and Mitchell W. Bradley, the witnesses to the same, and admitted to record. Teste J. B. Whitlock, C. H. C.

"A copy. Test. Loftin N. Ellett, C. H. C."

2. A copy of a deed, dated November 14, 1827, by which Richard Jenkins and his wife Janette conveyed two slaves (Susan and Eliza) and some other personal property, "for and in consideration of the natural affection which they bear towards their daughter Anne Richard Jenkins, and also for any child or children which may hereafter be born," to Jordan P. Camden and Samuel T. Williamson, as trustees, upon the following trust: "That the said Camden and Williamson, their heirs, executors, and administrators, shall permit the said Richard Jenkins and Janette his wife, during their natural lives, or the natural life of the survivor of them, to remain in quiet and peaceable possession of the aforesaid slaves, and their future increase, and other personal property hereby conveyed, and to take the profits thereof to their own use during their lives." This deed purports to have been signed by all the parties, viz., Richard Jenkins, Janette Jenkins, J. P. Camden, and Samuel T. Williamson, in the presence of two subscribing witnesses; and the following certificate is annexed to it:

"In Henrico County Court, Clerk's Office, December 22, 1827. This indenture was acknowledged by Richard Jenkins, a party to the same, and admitted to record. Test. Loftin N. Ellett, C. H. C.

"A copy. Test. Loftin N. Ellett, C. H. C."

"3. The depositions of Mrs. Kimbrough and Mrs. Ferrell."

Mrs. Kimbrough's testimony, in substance, may be briefly stated as follows: She is the daughter of said John Williams, and sister of Mrs. Janette Jenkins; Richard and Janette Jenkins were married at her father's house, in Henrico county, Virginia, in the year 1822; at the time of said marriage said John Williams owned certain negroes, named

Phebe, Susan, Wilson, and Maria, which went into the possession of said Jenkins and wife shortly after their marriage; does not recollect exactly how long they remained in said Jenkins's possession, but thinks it could not have been more than twelve or eighteen months before he sent them back to her father; a short time after they were sent back, they again went into the possession of Jenkins; knows that Jenkins was acquainted with the manner in which her father intended the negroes should go, "because, as before stated, he became offended because they were not given to him to do with as he pleased"; recollects that Jenkins came after the negroes himself the second time they went into his possession, and, as witness then understood, took them home again upon the terms on which her father was willing to give them—"that is, that they were to be for his daughter and her issue"; and thinks, though is not certain, that a deed of gift was made by her father, "at or about the time the negroes went into the possession of Jenkins the second time, conveying them to his daughter and her issue."

Mrs. Ferrell testified, substantially, as follows: John Williams was her husband, and Janette Jenkins was their daughter; Janette married Richard Jenkins; at the time of their marriage, John Williams owned the negroes Phebe, Susan, Wilson, and Maria, who were afterwards in the possession of said Jenkins, "John Williams having given them to him and his wife; the negroes were given to Jenkins for the benefit of Janette and her children"; they were afterwards in the possession of John Williams again, but witness does not know the cause of their returning to his possession; Williams retained them in his own possession until he gave them to Jenkins a second time; a deed of gift of these negroes was made by Williams, "for the benefit of Janette Jenkins and her heirs", but witness does not recollect the time when it was made; "heard John Williams frequently speak of the manner in which he intended to give the property, but does not recollect whether these intentions were expressed before or after making the deed of gift; he stated, that he intended giving the property to his daughter Janette and her children." On cross-examination she stated, further, that she is about eighty-eight years old; that her memory has been good, but

is not so good now—remembers matters that occurred a long time ago, better than those of more recent occurrence; does not remember when Richard Jenkins was married, nor when John Williams died, nor when said deed of gift was made; did not read the deed, but heard it read by Williams; did not hear nor know of any contract existing at the time said negroes were first delivered by Williams to Jenkins; does not know how long Jenkins retained possession of them after the first delivery, but it was not long; does not know whether she was present when the slaves were first delivered to Jenkins, but thinks she probably was; does not recollect of hearing any conversation between Williams and Jenkins, in reference to these slaves, before Jenkins obtained possession of them.

"4. The Revised Code of Virginia of 1849, from which plaintiff read pages 513 and 514; the Revised Code of Virginia of 1819, vol. 1, from which plaintiff read section 15 on page 365, section 51 on page 432, section 6 on page 363, and section 11 on page 364; 1st Munford's Virginia Reports, from which plaintiff read the case stated at page 518; 1st Call's Virginia Reports, from which he read the case stated at page 190; 12th Leigh's Virginia Reports, from which he read the case stated at page 445; 10th Leigh's Reports, from which he read the case stated on page 5; 9th Leigh's Reports, from which he read the case stated on page 245; 3d Grattan's Virginia Reports, from which he read the case stated on page 1; 6th Randolph's Virginia Reports, from which he read the case stated on page 135; and 6th Munford's Virginia Reports, from which he read the case stated on page 581; and it was agreed by counsel, that any statute of Virginia, and any decision of the Court of Appeals of that State, that either party might wish to refer to in argument, either in this court, or in the Supreme Court if an appeal should be taken, should be considered in evidence.

"5. Evidence tending to show the conversion and value of the slaves sued for; in regard to which value there was a conflict of evidence, but there was no controversy as to the fact that two slaves, conveyed in the deed of gift from John Williams to Janette Jenkins referred to, had been sold by the defendant.

"Defendant then read in evidence the following depositions:"

1. That of Jordan P. Camden, who testified, that he was present at Richard Jenkins's marriage, in 1822, in Henrico county, Virginia; "there were negroes living with him after the marriage, by name George, Harry, Phebe, Dick, Betty, Susan, Wilson, Maria, Charles, Charlotte, and Albert; all these he inherited from his father's estate, except Phebe, Susan, Wilson, and Maria; these last four he acquired by his marriage; said Jenkins exercised ownership and control over said slaves; he lived at a distance of two or three miles from his father-in-law, John Williams; witness believes that Jenkins paid taxes on said negroes from 1822 until he left Virginia somewhere between 1830 and 1835, except on Wilson, whom he sold to Neal McCurdy of Richmond, and Phebe, who died before he left Virginia; Jenkins always treated them as his own, and received the profits of their labor;" witness does not recollect that Jenkins sold Maria, nor can he say when Wilson was sold, or for what price, or whether said John Williams was then living; thinks Williams died intestate, because (as witness knows) his son Thomas returned from Alabama and administered on his estate.

2. That of Neal McCurdy, who testified, that he knew Jenkins twenty-five years ago, when he lived in Henrico county, Virginia, some ten or twelve miles distant from witness; "does not know how many negroes he then had in his possession, and cannot say anything as to ownership or control of such negroes as were under him; does not know where he obtained any of these negroes, or who paid taxes on them;" witness bought a boy named Wilson from him several years before he left Virginia; the price, as well as recollected, was $225; said Jenkins executed the bill of sale himself, and made the contract of sale.

"This was all the evidence"; and thereupon the court charged the jury:

1. "That said deed from John Williams to Janette Jenkins conveyed to her a separate estate, so that the defendant took no title thereby."

2. "That, if the jury believed the evidence, the deed from Jenkins and wife to Camden and Williamson, did not oppose any obstacle to the plaintiff's recovery."

3. "That, if the jury should find for the plaintiff, the measure of damages would be, the highest value proved from the time of the demand to the time of the trial, or the value at the time of the conversion, with interest on that value, except so far as the two negroes alleged to have been sold were concerned; and that, as to them, the jury might find the sums for which they were sold, with interest thereon to the time of the trial."

The defendant excepted to each one of these charges, and he now assigns them for error.

I. W. Garrott, with whom was J. G. Baldwin, for the appellant:

I. It is submitted that the deed of gift from John Williams to Mrs. Jenkins, then the wife of appellant, does not convey to her a separate estate.

The instrument is perfect in itself; and the first charge of the court is, that this deed of itself, without extraneous aid, conveyed a separate estate to Mrs. Jenkins. The instrument is clear and unambiguous, and though obnoxious to criticism on the score of orthography and grammar, there is no mistaking its sense and import. It contains, 1st, the consideration which moved the grantor to make it; 2d, the object of his bounty, and the language proper to carry into effect his intention—"I give to her the said Janette Jenkins and the lawful heirs of her body, the following property," &c.; 3d, the manner the grantor intended the property to be held—viz., "to the proper use and behoof of my daughter Janette Jenkins and her heirs"; and, 4th, the grantor binds himself to make a clear and undoubted right to the property "from the claim or claims from every person or persons whatsoever, to my said daughter and her lawful heirs, as above stated"—in other words, John Williams bound himself to warrant the title to the property to his daughter.

Let, then, all the matters in evidence as shown in the record be excluded for a moment, and let this deed be subjected to the proper tests, and it will be seen that it does not exclude the marital rights of the husband. The charge of the court is, that "said deed from John Williams to Janette Jenkins conveyed to her a separate estate, so that the defendant took

no title to the property given thereby." The law favors the rights of the husband, and "it is necessary that the instrument under which the claim is made must clearly speak the intention of the donor to exclude the husband, otherwise he shall take the property."—Hale v. Stone, 14 Ala. 810. "The intention must be clearly and unequivocally expressed to create a separate estate in order to exclude the husband."—Pollard v. Merrell & Eximer, 15 Ala. 174. "The language used should leave no doubt of the intention, and must be such as to forbid the court to speculate on what the probable object of the donor might have been."—15 Ala. 174, *supra*. "The purpose must clearly appear beyond any reasonable doubt—otherwise the husband will retain his ordinary legal marital rights over it."—2 Story's Eq. 1381, (quoted in 15 Ala. *supra*); also, Newman v. James & Newman, 12 Ala. 29; Brown v. Johnson, 17 *ib.* 232; Gould v. Hill, 18 *ib.* 83; Welch v. Welch, 14 *ib.* 76; Mitchell v. Gates, 23 *ib.* 438; 2 Story's Eq., § 1383.

1. The words here are, that the property is to be held "to the proper use and behoof" of my daughter. There is nothing in this language which points to the husband, and clearly nothing which indicates an intention to exclude his rights. The following authorities clearly show that these words are not sufficient to create a separate estate:—In Tyler v. Lake, 6 Cond. Ch. R. 74, 450, (quoted in Hall v. Stone, 14 Ala. 811,) the trustees were directed to pay certain shares of two *femes covert* "into their own proper and respective hands, to and for their own proper use and benefit." These words were held by the Lord Chancellor to be insufficient. So the words "for her own use and benefit" are also insufficient.—Kensington v. Dolland, 2 M. & K. 184, (quoted and approved in 14 Ala. 811). In Mitchell v. Gates, 23 Ala. 438, the words used were, "to remain in peaceable possession," and "to take the profits thereof to her own use and benefit during her natural life," and "then to descend to her heirs." In this last case, the court say—"'To his use,' 'to his own use,' 'to his own proper use and behoof,' what are they but the same thing?"—See also on this point, Ingo v. Forrester, 6 Ala. 418; Welch v. Welch, 14 *ib.* 76; Pollard v. Merrell & Eximer, 15 *ib.* 169, and cases cited in cases above referred to.

2. The Virginia cases do not maintain a different doctrine.

They are probably more liberal in construing gifts, &c. in favor of *femes covert*, but they still maintain the great principle, to-wit, that it must appear that the marital rights of the husband were intended to be excluded. "I can find no case where the husband or his creditors are excluded, except by express words of exclusion, or words from which that intention can be fairly drawn."—Scott & Wife v. Gibbon & Co., 5 Munf. 90, on pp. 93-4; West v. West's Ex'rs, 3 Rand. 373; Perkins v. Dickinson & Co., 3 Grat. 335, and other cases involving the principle, in all of which it will be seen that the Court of Appeals resorts to a process of reasoning, to show either from the deed itself, or from the circumstances under which it was made, that the marital rights of the husband were excluded—thereby plainly showing that it must be made to appear in some way that the rights of the husband did not attach—otherwise they would be regarded as in force.

3. Having thus shown that the deed in this case, so far as examined, does not convey a separate estate, it is submitted that the balance can have no influence upon the question. As far as examined, the conveyance is perfect—it uses proper language to convey, points out the grantee, describes the property, and then sets forth the manner in which this property was to be held—to-wit, "to the proper use and behoof of" Mrs. Jenkins. There is no ambiguity thus far, every thing is as plain as could be desired. The grantor then adds, "I bind myself, my heirs, &c., to make the above property a clear and undoubted right, as much so as can be made by word or deed, from the claim and claims from every person or persons whatsoever, to my said daughter and her lawful heirs, as above mentioned." This amounts to no more than an obligation to warrant the title, as if the grantor had said, "I bind myself, my heirs, &c., to warrant the right of said property against the claim and claims from every person or persons whatsoever, to my said daughter and her lawful heirs, as above mentioned." This is the only construction that can be placed on this portion of the deed, so as to make it consistent with the balance. It comes in the proper place for a warranty, and the language used is appropriate to this object. It could not be intended to control in any way the preceding parts of the deed, because no such idea is made to appear, and no such

supposition can be made without producing confusion. The grantor had already fixed the manner in which he intended the property to be held—viz., "to the proper use and behoof of" his daughter, and if this latter portion of the deed was allowed to have any influence, it would but obscure a sentence which, by itself, is perfectly plain. It could not be intended to have any influence on the way the daughter was to hold the property, for the further reason that the donor binds himself to make a good right to his daughter, and does not in any way allude to what the daughter was to do with the property after she obtained the right. Consequently, as the husband only took the property through his wife, and could only get the right after it came to her, and as nothing is said showing an intention to exclude his marital rights after it did come to her, it follows inevitably that the property vested in him, the moment title passed to his wife.

II. The second charge is, that the deed of Mr. and Mrs. Jenkins to Camden and Williamson presented no obstacle to a recovery in this case. This is clearly erroneous; because, even conceding that this deed conveyed to Mrs. Jenkins a separate estate, still she had a right to convey it as a *feme sole*. This doctrine is fully shown in 2 Story's Eq., §§ 1391, 1393-94-95; 2 Leigh 183; 9 *ib.* 200; 3 Rand. 373, (377); 23 Ala. 639. The fact that the husband joined in the deed, shows his consent thereto, and strengthens the defence of appellant.

III. The court charged the jury that the measure of damages was the highest value proved from the time of the demand to the trial. This is error. The measure of damages is not the highest value proved, but the value at any time between the demand and trial.—Tatum v. Manning, 9 Ala. 144, (149); Lee v. Matthews, 10 *ib.* 682, (688-9); Ewing v. Blount, 20 *ib.* 694, (695).

IV. The court also erred in its charge as to the two negroes sold in 1824 or 1825, and 1827—being that the measure of damages as to them was the price for which they sold, and interest thereon.

1st. The rule is not the price at which they sold, but the value; 2d, that the jury may assess the damages either at the time of conversion, or between that time and the time of trial. The court had no right to limit them to the price for

which they were sold, nor to the time of the conversion. It may be that the value between the date of the conversion and the trial, was less than at the time of the conversion; and the jury should not have been precluded from finding less damages by the charge of the court.

2. The court erred in charging the jury to find interest on the value of the two negroes that were sold. When the husband and wife live together, as in this case, and the husband receives and uses the proceeds of the wife's property, he cannot be made to account therefor. He could not be made to account for the hire of the slaves in this case; and if he could not, then he could not be made liable for interest on the value of those he had sold.—Clancy's Husb. & W. 352-3; Powell v. Hankey & Cox, 2 P. Wms. 82, (83).

V. But in no event can the husband be made to account for the rents and profits of his wife's separate estate in a court of law. He can only be made to account, if at all, in a court of equity, where complete justice can be done to all parties, by settling the equities between them. 1st, it is litigation between a trustee in equity and a *cestui que trust*, and is therefore a matter of peculiar jurisdiction for a chancery court; 2d, it is a matter of account extending through many years, where the husband has equitable rights as well as the wife, in the nature of equitable sets-off for so much of the proceeds of the wife's property as he may have applied to her benefit. For instance, if the husband was not of sufficient ability to maintain his wife without the use of the profits of her separate estate, and had used such profits to maintain her in a manner suitable to her rank, there the husband would not be held to account, or if to account, would be entitled to a deduction for all such sums as he had so expended.—Clancy on Rights 351-2. So, if the husband could show an express authority from the wife to receive and use for his own benefit the profits of her separate estate, he would not in equity be held to account. Clancy 352. And if she neither acquiesced or objected to the reception of the rents and profits, still the husband would not be held to account.—*Ib.* 352. So also, if the husband had applied the profits of the wife's separate estate to the use of the family, or in the purchase of jewelry for her, he would not be held to account.—*Ib.* 353. These authorities conclusively

show that the husband can only be held to account under peculiar circumstances, and when so held, a court of equity, which it is insisted has alone jurisdiction in such cases, will allow him a deduction for all such moneys as have been expended for the benefit of the wife. But it is apparent that a court of law is wholly inadequate to adjust the rights of the husband and wife, growing out of the trust estate of the wife.

TURNER REAVIS, *contra:*

I. The deed from John Williams to Janette Jenkins creates a separate estate. The orthography, syntax, and form of the deed clearly show that it was written by a person not only entirely ignorant of legal forms and technicalities, but incapable of expressing himself with any accuracy, clearness, or precision. Such a deed is construed with much more liberality than any other.—Saunders v. Saunders, 20 Ala. 716. The deed was made by a father to his married daughter and the lawful heirs of her body, in consideration of natural love and affection, to the proper use of his daughter and her heirs as above mentioned; and the donor, as if fearful that these words did not exclude the marital rights of the husband, binds himself to make to her and her lawful heirs, as above mentioned, as clear and undoubted a right to the property as can be made by word or deed, free from the claim and claims of every person or persons whatsoever. What stronger language could be used by an ignorant person, showing an intention to exclude the husband from any interest in the property? The case of Griffith v. Griffith, 5 B. Mon. 113, is fully and strongly to the point, that the deed gave a separate estate to Mrs. Jenkins.

The deed was made in Virginia, where the courts, in the construction of gifts to married women, lean strongly against the marital rights of the husband. In this respect, the courts of that State differ from the courts of this.—Scott v. Gibbon, 5 Munf. 86; Smith v. Smith, 6 *ib.* 581; West v. West, 3 Rand. 373; Perkins v. Dickinson, 3 Grat. 335. The last two of these cases are very strong ones, and are in direct opposition to the cases relied on by the appellant's counsel, in 12 Ala. 42, 15 *ib.* 169, 21 *ib.* 414, 23 *ib.* 438, 2 Port. 463, 6 Ala. 418, and 14 *ib.* 803. The last two cases cited from the Virginia Re-

ports show, also, that the courts of that State look to evidence *dehors* the conveyance, in order to ascertain an intent to exclude the marital rights of the husband. In construing a deed made there, the same rule must prevail here; and if there be any doubt that John Williams intended that Mrs. Jenkins' husband should have no interest in the property, that doubt is removed by the testimony of Mrs. Kimbrough and Mrs. Ferrell. The deed, then, according to the law of Virginia where it was made, creates a separate estate. It is not material, therefore, whether it would have that effect if made here, or not.

But the deed creates a separate estate, no matter where it was executed. A gift to a married woman, "for her own proper use", was held to create a separate estate, in Snyder v. Snyder, 10 Barr 423; in Warren v. Haley, 1 S. & M. Ch. Rep. 647; and in Griffith v. Griffith, 5 B. Mon. 113. The deed now before the court shows a much clearer intention to exclude the marital rights of the husband than was shown in either of these cases; for it not only contains the same words showing an intention to create a separate estate, but others showing such intention. It warrants the property to her and the heirs of her body, "from the claim and claims of every person or persons whatsoever." These terms alone are sufficient to create a separate estate, as was held in Brown v. Johnson, 17 Ala. 232; and they certainly do in conjunction with the words, "to her proper use and behoof." In Brown v. Johnson, *supra*, a deed from a father to his married daughter, "and her heirs after her, free from the claim or claims of any person or manner of persons whatever", was held to create a separate estate. The deed before the court is from a father to his married daughter, and the lawful heirs of her body, to the proper use and behoof of his daughter and her heirs above mentioned; and he binds himself to make her as clear and undoubted a right to the property as can be made by word or deed, free from the claim and claims of every person and persons whatsoever.

In Newman v. James, 12 Ala. 29, a gift to a married woman, "to have and to hold the same for her use, benefit, and right, without let, hindrance, or molestation whatever", was held to create a separate estate. Such, also, was held to be

the effect of the words "exclusively to her and the heirs of her body forever", in a bequest to a married woman, in the case of Gould v. Hill, 18 Ala. 84. Such, also, was held to be the effect of a conveyance to a married woman, "to and for her only use and benefit", in Cuthbert v. Wolfe, 19 Ala. 373. In Furlow v. Merrell, 23 Ala. 705, it was held, that a bequest to a married woman, "entirely for her and her children", would create a separate estate. In Margetts v. Barringer, 7 Simons 482, a bequest to a married woman, "for her own use and benefit, independent of any other person", was held to create a separate estate. In a case cited by counsel, in 5 Ves. 520, a disposition to a married woman, "for her own use", was held to create a separate estate. The same words were held to have the same effect, in Scott v. Gibbon, 5 Munf. 86. The same words were held to have the same effect, in a case decided by the Supreme Court of Pennsylvania—see note 1 to p. 521 of 5 Ves., first Am. ed. In Hamilton v. Bishop, 8 Yerg. 33, a gift to a married woman and the heirs of her body, to the use of herself and her children, and to remain in her possession for the use and support of said children, forever, was held to create a separate estate. The case of Johnson v. Thompson, 4 Dess. 458, is still more favorable to the wife than any of the cases cited. See, also, Taylor v. Stone, 13 S. & M. 652.

Now, the words of the deed before the court—"I bind myself to make her as clear and undoubted a right to the property as can be made by word or deed, free from the claim and claims of every person and persons whatsoever"—are as expressive of an intention to exclude the marital rights of the husband, as the words used in the case of Brown v. Johnson, Newman v. James, and Margetts v. Barringer. And the terms "proper use and behoof", are equivalent to the term "exclusive", in Gould v. Hill; to the terms "for her only use and benefit", in Cuthbert v. Wolfe; and to the term "entirely", in Furlow v. Merrell. See Webster's Quarto Dictionary, for definitions of the several words. The terms "proper use and behoof" receive a different construction, when used in a deed of this description, from what they receive when used in other conveyances. This is expressly decided in Griffith v. Griffith, 5 B. Mon. 113. What the court say to

the contrary, in Mitchell v. Gates, 23 Ala. 447, was not necessary to the decision of that case, and is unsustained by authority. None of the cases cited by the counsel for the appellant, which were decided by this court, have any resemblance to the case at bar; and the cases cited from other courts are against the weight of authority cited for the appellee. It is useless, however, to labor this question; for the law of Virginia is decisive that the deed to Mrs. Jenkins gives her a separate estate.

II. The only question as to the effect of the deed purporting to have been made by Jenkins and his wife to Camden and Williamson, which arises upon the record, is, whether the execution of the deed by Jenkins *alone* conveyed the legal title, so that the administrator of Mrs. Jenkins cannot recover the property at law. It is very clear that it cannot have that effect—first, because the legal title was in Mrs. Jenkins, and he could not convey it (Hooper's Ex'r v. Smith, 23 Ala. 639; 13 S. & M. 652; 8 B. Mon. 33); secondly, because the deed was not executed, accepted, or assented to by the trustees (4 Gilm. R. 159; 10 Misso. 411; 4 Hen. & Munf. 415).

The question whether Mrs. Jenkins could convey a title to her separate estate, which could be set up at law, does not arise upon the record. The bill of exceptions states, that all the evidence before the jury is set out in it, and does not show that the deed was ever executed or delivered by Mrs. Jenkins, or that it was executed, accepted, or assented to by the trustees. The only evidence of the execution or delivery of the deed is, first, the answer of Jenkins himself to interrogatories propounded to him by the plaintiff, that he supposes he executed it, but has no recollection of having done so; that he does not know whether the other parties executed it or not; and that he requires the deed to be duly authenticated and proved; secondly, this statement in the bill of exceptions: "The plaintiff offered and read to the jury the following evidence: 1st, interrogatories to the defendant, and his answers thereto; 2d, the copies attached as exhibits to the interrogatories, which were admitted in evidence in lieu of the originals, by consent of the defendant's counsel. The defendant also admitted that the originals of said copies had been executed, proven, acknowledged, and recorded, as endorsed and certified

on said copies." The copies referred to are the deed of gift from John Williams to Janette Jenkins, and the deed purporting to have been made by her and her husband to Camden and Williamson. The certificate endorsed on the deed of gift shows, that the deed was proved by three witnesses, and recorded. The certificate endorsed on the deed to Camden and Williamson shows that it was acknowledged by Jenkins only, and does not show that it was proved as to any of the other parties. It will be perceived from the bill of exceptions, that the admission of the execution of the latter deed is expressly confined to the evidence of the fact furnished by the certificate endorsed upon it. This admission goes to the same extent precisely that the admission of Jenkins in his answer goes to, and is in exact agreement with it. The consent of the defendant's counsel that the copies should be read in lieu of the originals, was only a waiver of the production of the originals, and not an admission that the originals had been executed. This is shown, not only by the fact that there was a subsequent admission as to their execution, but by the express limitation of such admission to the evidence of the fact of their execution furnished by the certificate endorsed upon them, and by Jenkins' statement under oath, that he did not know whether the other parties to the deed purporting to be made by him and his wife (a fact which he must have known if it existed) executed it or not, and his requirement that it should be duly authenticated and proved. It seems entirely clear, then, that Jenkins not only cautiously avoided an admission of the execution of the deed to Camden and Williamson by any one but himself, and that there was no evidence of its execution by any of the other parties, but that he did not rely upon it in the court below.

The fair inference from the bill of exceptions is (and which is the fact) that the defence set up in the court below was, first, that the deed of gift to Mrs. Jenkins did not create a separate estate, and secondly, that the property had been delivered to Jenkins shortly after the marriage, and was therefore presumed to be an advancement; and that consequently the subsequent execution of the deed of gift could not affect the rights he acquired by the first delivery.—See the testimony introduced by the defendant. The bill of exceptions

also shows, that the copy of the deed purporting to be made by Jenkins and his wife was read in evidence by the plaintiff. This was done for the purpose of rebutting the inference that the first delivery of the slaves was a gift, or advancement, as the fact that Mrs. Jenkins was named as a party to a deed conveying the same property, which Jenkins acknowledged he executed, was a strong circumstance to show that he did not consider the first delivery as a gift to him, but that he did consider the title to be in his wife. The charge of the court, that the deed opposed no obstacle to the plaintiff's recovery, was merely in reference to the fact that it had been executed by Jenkins alone, and to prevent the jury from being misled by it. The idea that the deed was executed by Mrs. Jenkins also, and barred the plaintiff's recovery, is thus shown to be altogether an after-thought.

But if it is not entirely clear, that there was no evidence of the execution or delivery of the deed by Mrs. Jenkins, nor any admission of such execution, it is certain that the bill of exceptions admits of two constructions—one, that the execution of the deed by all the parties was admitted; and the other, that its execution by Jenkins only was admitted. Now, the rule is, that if a bill of exceptions admits of two constructions, that will be adopted which will affirm the judgment.—Dozier v. Joyce, 8 Port. 303; Patton v. Hayter, 15 Ala. 18; Donnell v. Jones, 17 *ib.* 689; Perminter v. Kelly, 18 *ib.* 716; Andress v. Broughton, 21 *ib.* 200. Consequently, the effect of the deed, if it was in fact executed by Mrs. Jenkins, does not arise upon the record; but if it does, the charge of the court, that the deed opposed no obstacle to the plaintiff's recovery, was right, on the following grounds:

1. At common law, every deed of a *feme covert* is void; nor can a *feme covert* make any contract which will affect her separate estate, at common law. The separate existence, or separate estate of a married woman is unknown to the common law: a separate estate is the creature of a court of equity; and it is only in a court of equity that a married woman, having a separate estate, is regarded as a *feme sole*, and as such, allowed to dispose of it.—Clancy on H. & W. 321; 1 White's Lead. Cases, 360 top p. (65 Law Lib.); Bell on Prop. of H. & W. 513 mar. (67 Law Lib.); Roper on H. & W. 235-240

mar. (32 Law Lib.); 2 Story's Eq. § 1397; Bing. on Inf. & Cov. 237, and note 5; Marshall v. Rutton, 8 Term Rep. 547; Kavanaugh v. Brown, 1 Texas Rep. 481; Calhoun v. Calhoun, 2 Strob. Eq. 236; Askew v. Daniel, 5 Ired. Eq. 321; George v. Goldsby, 23 Ala. 326. No case can be found, where the deed of a *feme covert*, conveying her separate estate, was held valid, *at law*, except where the conveyance was under an express power to convey, in the instrument creating the estate, or was executed in conformity to a statute. The case of Hooper's Executor v. Smith, 23 Ala. 639, does not decide that the deed of a married woman, conveying her separate estate, is good at law: nor can that case be sustained, either upon principle or authority; it stands alone, and in opposition to principle and all authority. The very extract from Clancy, on which it is based, shows, that it is *in equity* that a married woman, having a separate estate, is regarded as a *feme sole*, and as such allowed to dispose of it. The attention of the court was not directed to the distinction between the effect of such conveyances at law and in equity. If it had been, the decision must have been different. It is therefore submitted, that that case cannot be properly adhered to; and that if it can, it does not decide upon the effect of a deed. Not one of the other authorities relied on by the appellant's counsel decides that a conveyance by a married woman of her separate estate is good at law. They all assert the general principle, which is not disputed, that in equity a married woman is regarded as a *feme sole*, in respect to her separate estate, and as such allowed to dispose of it. To this extent the Virginia cases relied upon go, and no further. They are all equity cases, (except West v. West,) and merely assert the general doctrine of the courts of equity. The case of West v. West, 3 Rand. 373, decides, in conformity with the general rule, that a married woman may dispose of her separate personal property, by will. But the reason why she may dispose of her separate personal property by will, so as to pass a title to the executor or administrator, at law, while she cannot pass a title at law by deed, is, that the will does not take effect until after the coverture ceases, and the deed, if it take effect at all, must do so during the coverture. It seems clear from what has been said, that the deed of Jenkins and his wife, if executed

by her, could not be set up in a court of law, to defeat a recovery by her administrator.

2. If Mrs. Jenkins could convey a title to her separate estate, which could be asserted in a court of law against her administrator, her deed is void for the want of a privy examination pursuant to the Virginia statute.—1 Rev. Code of Virginia, of 1819, p. 365, § 15; 1 Call 190; 1 Munf. 518; 12 Leigh 445; 9 *ib.* 200; Code of 1849, p. 513; Sess. Acts 1843-4, p. 53. It is contended, however, by the counsel for the appellant, that the statute does not apply to personal property; and Mr. Baldwin, in his written argument, says it would amuse a Virginia lawyer, to tell him that it did. This arrogant assertion is denied and refuted in the opinion of distinguished Virginia counsel, which Mr. Baldwin himself has filed on behalf of the appellant. It is also contended by the appellant's counsel, that if the statute applies to personal property, it does not apply to separate estates. In this respect, also, the Virginia counsel differs with the appellant's; and he is sustained by the case in 9 Leigh 200. But while the Virginia counsel admits, in his written opinion, that the statute applies to separate personal property, he argues, that it merely *authorizes* a privy examination in respect to conveyances of such property, while it *requires* it in a conveyance of separate real estate; and the reason he gives for the distinction is, that without the aid of the statute, a married woman could convey her separate personal property by her sole act, but not her real estate. Now this is not true in respect to the real estate; for she has precisely the same power to dispose of her separate real estate that she has to dispose of her separate personal property.—2 Story's Eq. §§ 1389-90, and cases cited in note 3. As, therefore, the reason for the distinction does not exist, the argument falls to the ground; and consequently, if the statute requires the privy examination in a conveyance of real estate, it requires it in a conveyance of personal. The case in 9 Leigh 200, is decisive to show, that a privy examination is requisite to a conveyance of separate real estate; but the effect of the statute in a conveyance of separate personal property is not passed upon. When, therefore, the court say a married woman may convey her separate personal estate by her sole act, the court must be understood as refer-

ring to her power when unrestricted by the conveyance creating the estate, and as having no reference to the restraining effect of the statute. No question as to the effect of a conveyance of separate personal estate, without a privy examination, was before the court, and of course none was decided. The statute, then, is not enabling; for, according to the authorities cited, a married woman has precisely the same power to dispose of her separate real property that she has to dispose of her separate personal. If, therefore, she might have conveyed either, without the aid of the statute, the statute was unnecessary as an enabling statute, and consequently can only be regarded as *disabling*, or as enabling to convey a title that would be good *at law*, which before could only be asserted *in equity*. The latter construction seems to be the true one, so far as separate estates are concerned. As to the rule for construing a statute under such circumstances, see Smith's Com. on Stat., § 581; 4 Day's Rep. 60. There can be no serious question that the statute applies equally to personal and real property. The terms "any estate or interest" are as general and comprehensive as they can be to include both. 2 Bouv. Inst., p. 212, § 1689. The proviso in the statute is a mere limitation of the wife's liability upon any covenant or warranty in a deed by which she conveys real estate. The Code of 1849, p. 513, in terms, includes personal estate. The authorities for the section of the Code of 1849, referred to, show that no change had been made in the section of the Code of 1819.—See the Sess. Acts of 1843-4, p. 53. As no change had been made, and as the Code of 1849 refers in the margin to the Code of 1819, as authority for its provisions, the Code of 1849 must be regarded as a legislative construction of the Code of 1819, referred to in the margin. If these views be correct, they are decisive of the invalidity of the deed of Jenkins and wife, so far as she is concerned; and consequently the charge of the court to that effect was right.

3. If the deed is void, *as a deed*, or for the want of a privy examination, it cannot operate as a parol declaration of a trust, or a gift, or an appointment; for by the laws of Virginia, all such gifts are void.—1 Rev. Code of 1819, p. 432, § 51; 6 Rand. 135; 3 Grat. 1; 9 Leigh 245; 10 *ib.* 5. For if a married woman is to be regarded as a *feme sole*, in respect

to her separate estate, *at law*, as well as in equity, her conveyances must conform to the statute in all respects as if she were in fact a single woman. But this question does not arise upon the record. The charge was, that *the deed* presented no obstacle, &c.

4. There is not only no evidence in the record that Mrs. Jenkins executed the deed, but there is none that she ever delivered it, or recognized it. The mere fact that it was acknowledged by her husband is no evidence that it had been delivered by her, either to him or to the trustees, especially when he swears that he does not know whether she executed it or not. A delivery will not be presumed against a wife, who is presumed to be under the coercion of her husband, when the deed purports to give him an interest in her property.—Gamble v. Gamble, 11 Ala. 966; 2 Dev. & Batt. Eq. 65; 1 Stew. & Por. 56.

5. There is no evidence in the record, that the trustees either executed the deed, or accepted it, or assented to it. Until they did one or the other, the deed was wholly inoperative at law. It was not beneficial to them; on the contrary, it imposed duties and liabilities upon them, without giving them any beneficial interest, or compensation. Their assent, under such circumstances, cannot be presumed.—Hulick v. Scovil, 4 Gilman's R. 159; Renfro v. Harrison, 10 Misso. 411; Kennedy v. Waller, 4 Hen. & Munf. 415.

So then, whether the deed was void as to Mrs. Jenkins, at common law, or for the want of her privy examination, or for the want of delivery by her, or for the want of execution, acceptance, and assent of the trustees, it opposed no obstacle to the plaintiff's recovery.

III. At the time Jenkins sold the two slaves, the legal title and the right of possession were in his wife, so that the sale amounted to a conversion.—Hooper's Ex'r v. Smith, 23 Ala. 639; 13 Sm. & Mar. 652. The right of action was suspended during the coverture. Upon the death of Mrs. Jenkins, the legal and equitable title united in her administrator, so that he could have sued the purchasers of the property and him who converted it by selling it. It seems clear, that if the title vested in the administrator, so that he could have sued the purchaser, it vested in him so as to enable him to sue the

seller. The title, in either case, relates back to the time of the sale.—20 Ala. 338; 21 *ib.* 458; 22 *ib.* 199; 13 S. & M. 652. The plaintiff was, therefore, just as much entitled to recover the value of the two negroes sold by Jenkins, in Virginia, as he was to recover the value of those remaining in his possession.

The case cited by the appellant's counsel, from 7 Leigh 66, has no resemblance to this. In that case, the husband had no remedy against the wife, either at law or in equity; consequently, his administrator had none. In the case cited by the appellant's counsel, from 3 Leigh 255, the legal title was in the husband, by his purchase, and consequently his executor was entitled to recover the property from the *cestui que trust*. That case, therefore, is not like the present. But if it were, it only shows, there is a difference between the law of Virginia and the law of Alabama, in relation to the remedy in such a case. That case shows that the remedy is in equity. The cases decided by this court show, that where a conveyance is made to a married woman, without the intervention of a trustee, upon the dissolution of the coverture the legal and equitable title unite, so that the wife or her administrator can sue or defend a suit for the property at law.—Knight v. Bell, 22 Ala. 198; Powell v. Glenn, 21 *ib.* 458; Randall v. Shrader, 20 *ib.* 338; Puryear v. Puryear, 12 *ib.* 13; same parties, 16 *ib.* 491-2; Cook v. Kennerly, 12 *ib.* 42; Gunn v. Barrow, 17 *ib.* 747. Conceding, then, that the case in 3 Leigh 255, shows that the remedy of Mrs. Jenkins' administrator would have been in equity, it does not affect the plaintiff's right to recover here, where the remedy is different. The remedy is governed by the law of the forum.—2 Ala. 397.

The record does not show that any question was made in the court below, as to the right of the plaintiff to recover the value of these two slaves, if he were entitled to recover at all. The charge only relates to the measure of damages, in respect to them. It is too late, therefore, for the defendant below to object that he was not liable to account for them at law.

But it is objected, that the charge is wrong in respect to the measure of damages for the conversion of these two slaves. The charge of the court on this point was strictly correct, and

in exact conformity with Lee v. Matthews, 10 Ala. 682. It is contended, however, that Jenkins was not accountable for the profits of these two slaves, during the coverture, and that, therefore, interest should only have been given from the time Mrs. Jenkins died. It is a sufficient answer to this position, to say, that it does not appear from the record that Mrs. Jenkins lived with and was maintained by her husband; and it is only in that event that he would not be accountable for hire and profits. Besides, the sale of the slaves was a wrongful act; if it be true, therefore, that if he had not sold the slaves he would not have been accountable for the profits, having wrongfully sold them, he cannot be heard to say that he shall be in as good a situation, notwithstanding, as if he had not violated his trust. This answer to the objection seems to be conclusive.

But it is contended, that there was no evidence of the price for which one of these slaves was sold, and therefore there could be no recovery as to that. This is a mistake. The bill of exceptions states, that there was "evidence tending to show the conversion and value of the slaves sued for." This is a sufficient answer to that objection; but if it were not, the charge itself was right, and if the verdict was wrong, it cannot be reached by writ of error; a motion for a new trial was the proper remedy.

It is contended, also, by the appellant's counsel, that the charge was wrong in respect to the measure of damages for the conversion of the other slaves. The charge is, that "the measure of damages would be the highest value proved, from the time of the demand to the time of the trial, or the value at the time of the conversion, with interest on that value." This is the general rule.—Ewing v. Blount, 20 Ala. 694; Lee v. Matthews, 10 *ib.* 682; Tatum v. Manning, 9 *ib.* 144; Sedgw. on Dam. 502-3, which see particularly. If there be any error in the charge on this point, it is in favor of the appellant. Besides, it was waived and cured by the agreement to be found in the judgment entry, that the judgment, as to all the slaves except the two sold, might be discharged by surrendering the slaves.

IV. The claim now set up by Jenkins, that he is entitled to the slaves in controversy, *jure mariti*, is another after-

thought. There is nothing in the record upon which that question can be raised. But if there were anything, it is sufficient to say, that Mrs. Jenkins' administrator is entitled to recover the slaves for the purpose of paying her debts. It will be time enough for him to set up that claim, when the estate comes to be distributed.

Upon the whole, it is submitted for the appellee, that there is no error in the charge of the court, and that the judgment should be affirmed.

CHILTON, C. J.—We shall first ascertain the legal effect of the deed from John Williams to his daughter Janette Jenkins. Did it vest in her a separate property in the slaves therein mentioned? We are satisfied, upon a careful analysis of the whole instrument, that such was the intention of the grantor, and that according to the construction of such instruments by the courts of Virginia where the deed was made, such was its legal effect there at the time of its execution. It is manifest from the face of it that it was drawn by an illiterate and inexperienced draftsman, and such instruments should not be subjected to those rigid rules of legal criticism, which might properly enough be applied in the construing of more formal and technical instruments. The great point to be attained in the construction of all written instruments, is to arrive at the true meaning and intention of the parties to them, and, if that intention be lawful, to give effect to it.—20 Ala. 710; 22 *ib.* 433.

In this deed, the father gives to his daughter, then a married woman, and the lawful heirs of her body, the slaves in controversy, forever, to the proper use and behoof of said daughter and her heirs as aforesaid, and binds himself, his heirs, &c., "to make the above named property a clear and undoubted a right, as much so as can be made by word or deed, from the claim and claims from every person or persons whatever, to my daughter and her lawful heirs as above mentioned."

It is true, that the law favors the marital rights of the husband; and in order to exclude him, there must be a clearly expressed intention. The language used should be such as to forbid speculation as to what the probable object of the donor

might have been.—Pollard v. Merrill & Eximer, 15 Ala. 174. In the language of Judge Story, "the purpose must clearly appear beyond any reasonable doubt, otherwise the husband will retain his ordinary legal marital rights over it."—2 Story's Eq. § 1381. At the same time, however, it is well settled, that no particular language or form is necessary to create a separate estate in a married woman: it is sufficient if, from the whole instrument by which it is limited, the intention clearly and unequivocally appear.—Cuthbert v. Wolfe, 19 Ala. 373; 17 *ib.* 232. In the case before us, the donor gives the property to his daughter, and to the heirs of her body, to the proper use and behoof of said daughter, and binds himself to make her title as clear and undoubted as could be done by word or deed—a right free from the claim of every person whatever, and, of consequence, from the husband's claim. It would be difficult to find language more comprehensive than the donor here uses. True, it is inserted somewhat informally, as a species of warranty in a deed of gift, which, being voluntary, is perhaps nugatory; but it serves to explain the other portions of the instrument, and to show that the intention was to exclude every one from claiming and enjoying any right to the property except his daughter, to whose proper or particular individual use he gives it. See Griffith's Adm'r. v. Griffith, 5 B. Mon. Rep. 113. It would seem absurd to say that he bound himself to vest the right in his daughter, to her *proper use*, free from the claims of all and every person, and consequently from the husband's claim, and at the same time gave the property to the husband. It is evident that the donor points to the husband, and the manner in which he is conveying the title, and not to any supposed defect in the title growing out of his want of ability to confer a good one. He is to make her such title as will secure the property to her proper use, exclusive or free from the claims of every other person—the right is to be, in this respect, "as clear and undoubted as could be made by word or deed." It would, we think, among the illiterate, be very difficult to find language more expressive of an intention to give the property to the daughter, and to exclude the husband as well as every one else.

As to the effect of the deed from Richard Jenkins and wife

(Janette) to J. P. Camden and Samuel T. Williamson, we have had some difficulty, and find some conflict of authority.

Before, however, proceeding to discuss this point, it is proper to observe, that the objection insisted on by the counsel for the appellee, that it was not proved to have been executed by Mrs. Jenkins, cannot be sustained. The appellee introduced the copy of the deed, and read it to the jury himself, not as the deed of the husband only, but as the deed of the parties whose names appear attached to it. The bill of exceptions states, in enumerating the items of proof made by the parties respectively, that the second item of proof offered by the plaintiff below was, "The copies attached as exhibits to the interrogatories, which were admitted in evidence, in lieu of the originals, by consent of the defendant's counsel. The defendant also admitted, that the originals of said copies had been executed, proven, acknowledged, and recorded, as endorsed and certified on said copies." Having introduced and read them to the jury, generally, without any attempt to limit their effect as proof, the appellee cannot now be heard to say they were not proved. He conceded their genuineness by reading them; nor is the concession at all restricted by the admission on the part of the counsel for the defendant in the court below, "that the originals of said copies had been *executed*, proven, acknowledged, and recorded, as endorsed and certified on said copies." This has reference to the registration of the instruments. It was an admission obtained for the benefit of the plaintiff below, designed to enlarge the effect of his proof, and not to limit the operation of the deeds, or to question their genuineness.

Let us proceed to consider its legal operation, as respects the rights of the parties before the court.

The action is trover, by the administrator of the wife, against the husband, to recover for the conversion of slaves in whom, as we have shown, the wife had a separate estate, secured by the deed of gift from her father. This deed purports to convey these slaves to Camden and Williamson, in consideration of the love and affection which Richard, the husband, and Janette, the wife, bore towards their daughter, Ann Richard Jenkins, and for any child or children thereafter to be born, to have and to hold to the said Camden and Wil-

liamson forever, &c., "in trust, nevertheless, that they shall permit the said Richard Jenkins and Janette, his wife, during their natural lives, or the natural life of the survivor of them, to remain in quiet and peaceable possession of said slaves and their future increase, &c., and to take the profits thereof to their own use during their lives."

If we concede the right and the capacity of the parties to convey, the effect of the deed would be, to vest the legal title in the trustees named in it, and the beneficial interest in the husband and wife during the coverture; and if the wife survived the husband, she would be vested with the complete title, as the trust, in that event, would be fully executed, nothing remaining for the trustees to do; but upon the death of the wife, the husband surviving, the title remains in the trustees, in trust for him during life, and after his death for the personal representatives of the wife.

The question then arises, Is the deed valid? Can husband and wife join and make a valid deed, transferring her separate property in chattels to a third party, which can be set up by the husband, after the death of the wife, in a court of law? In other words, can the wife create an interest, by deed, pending the coverture, in favor of her husband, in her separate personal estate, which can be regarded by a court of law?

I have been not a little perplexed in looking into the authorities to find the question left by them in so much uncertainty and doubt.

Whatever may be the doctrine as held by some of the States in the Union, it is now well settled in England, and is so held by the Supreme Court in this and some of the other States, that a *feme covert*, with respect to her separate estate, is to be regarded as a *feme sole*. The doctrine asserted by Lord Chancellor Thurlow in Fettiplace v. Gorges, (1 Ves. Jr. 46; S. C. 3 Bro. Ch. Rep. 8,) that where personal property is given to a married woman to her sole and separate use, it is subject to all the incidents of property vested in persons *sui juris*, among which is the *jus disponendi*, is generally received, and we think correctly, as a just and proper exposition of the law upon this subject.—2 Bright on Hus. & Wife 220; Jaques v. Methodist Episcopal Church, 17 John. 548; 20 Wend. 570;

Roper on H. & W. vol. 2, p. 182; Vizonneau v. Pegram, 2 Leigh 183; Lee v. Bank U. States, 9 Leigh 200.

In order to pass the title to the wife's real estate, by the common law, it was necessary that she and her husband should join in levying a fine; and in England, since the act abolishing fines and recoveries, (3d and 4th William IV. ch. 74,) married women are enabled, with the concurrence of their husbands, and in certain cases without such concurrence, to dispose by deed, or relinquish any estate they may have, as effectually as they could do if *sole; provided*, such deed be acknowledged by her on privy examination before some officer pointed out in the act; and similar acts, providing for validating the deeds of *femes covert* upon acknowledgments taken after previous examination apart from the husband, have been passed in most (if not all) of the States. These are enabling statutes, conferring upon the wife a power which she did not before possess, and were not designed to take away any power which she previously possessed of making a valid disposition of her separate personal estate. Such we regard the statutes of Virginia, requiring a privy examination of the wife as a pre-requisite to her making a valid conveyance of her realty.—See Rev. Code of 1819, p. 365, § 15. Gifts, by deed, or otherwise, by a married woman of her separate personal estate, remain unaffected by the statute, as respects the rights of the parties to them, and as between the parties themselves.

We refer to this mode, pointed out by the statutes, by which married women, in conjunction with their husbands, can pass the legal title to their real estate, and which is but the substitute for the common-law mode of fine and recovery, merely to show the anomaly which would exist, if there was no method of passing the absolute interest in the wife's personal chattels. As such property so often changes hands;—so often consists of articles of merchandize, and commodities which must needs be sold or exchanged, or become of little or no value,—it would be very remarkable if they could not be disposed of, so as to vest the right in the purchaser; and not less anomalous to hold that each purchaser or person who acquires the right from the wife must be driven into a court of equity, or be liable at law for a conversion of the property and damages.

The distinction which exists between dispositions of real and personal estate by married women, as respects the necessity of a private examination apart from their husbands, is very correctly alluded to in Lee v. The Bank of the United States, 9 Leigh 200; and in the views taken by the learned judges in that case, we fully concur. It it very clear, that no such examination is required to render the transfer of her separate personal estate available.

We fully concur with the learned counsel for the appellee, that a married woman can enter into no contract upon which she can be charged in a court of law; and this irrespective of whether she has a separate estate or not. The great case of Marshall v. Rutton, 8 Term R. 547, has settled the law in England, and this case has been followed generally in this country. That was an action of *assumpsit* against a married woman for goods sold and delivered. The other cases referred to by the counsel show like efforts to make the wife liable, at law, upon her contracts. This, we concede, cannot be done. But it by no means follows, because she cannot create a debt, or incur an obligation, which can be made the ground of action at common law against her, or charged by legal process against her separate estate, that she may not transfer a legal right to another, or such a right to the enjoyment of her personal property, which she owns separate and distinct from her husband, as a court of law will regard and uphold. It is conceded by all, that she may dispose of such property by will; why not in any other manner by which such property is ordinarily transferred? True, if she make the disposition by deed, she is not, at law, liable upon the covenants contained in it—no action can be maintained at law against her upon it; but it is effectual to pass all the interest she has, and she has the unlimited right of disposition, *as though she were sole.*

In relation to this point, Mr. Roper, in his work on Husband and Wife, page 229, holds the following language:—"It having been once established, that a married woman might lose that character, and act at law, by circuity through the intervention of trustees, as a single woman, in regard to real or personal estate settled to her separate use and disposition, a court of equity, disengaged from legal forms, went further,

and held that it would supply the omission of trustees, and raise a trust upon the apparent intention; so that, whether there be trustees or no trustees appointed, a married woman is now competent, at law or in equity, (although contrary to the rules and principles of the general common law,) to take and dispose of property limited to her separate use as a *feme sole*." And on page 240 the same author says, "Where property is limited to the separate use of a married woman *generally*, without giving to her any particular power of disposition, she may sell, pledge, or encumber it, *in the same manner as if she were a feme sole*."

In the case of Dewey v. Bayntun, 6 East 257, it seems to have been conceded by the court, that the husband and wife might contract pending the coverture through the medium of trustees, she purchasing with proceeds of her separate property certain furniture, pictures, and statuary belonging to him. The question, on which the rule for a new trial was made absolute, was, whether there was not such inadequacy in the price to be paid as stamped the transaction as fraudulent and a device to defeat the claims of the creditors. If, however, the parties could not have contracted, in the view of a court of law, in reference to the wife's separate property, the court should have made the case turn upon that point, and have readily disposed of it by that objection, which met it at the threshold. In commenting upon this case, Lord Eldon said, "From the only account I have had of it, it appears to have been asserted, that a husband and wife could not, after marriage, contract, for a *bona fide* and valuable consideration, for a transfer of property from him to her or trustees for her. *The doctrine is not so, either here or at law.*"—Lady Arundell v. Phipps, 10 Ves. 148; Bright on H. & W. 109.

In Wright v. Rutton, 2 Ves. R. 673, the Master of the Rolls takes the distinction between an assignment in trust by indenture, executed by husband and wife, for the benefit of the husband, of personal property bequeathed to the wife in the hands of the executor, and such an assignment of her separate estate, thus—"The clear distinction is, that in point of law and the consideration of this court, a married woman has no disposing power, although she has a disposing mind. As to any property she has, the law and this court consider her

so much under the coercion of her husband, that she cannot exercise any disposing power; *with this exception*, that though at law she is totally devoid of any property, *any person may make her a feme sole as to particular property he gives her;* but as to any other property which the donor has not given to her sole and separate use, she is a person having no disposing power; and the husband cannot, in any way, act with regard to any property in a trustee for her, or dispose of it, without the intervention of this court, as he may upon choses in action", &c.

Suppose, in the case before us, the slaves had actually been delivered to the trustees named in this deed, and a stranger had taken them out of their possession; could not the trustees have maintained an action at law for their recovery, for the purposes of carrying out the trust reposed in them? It is certain that they could. Yet their right would have been derived from the married woman; and whether from the deed or the delivery, makes no difference: it is still her act, or disposition of them, which vests the title or right to maintain the action.

Upon the whole, without citing further authority, we are of opinion, that Mrs. Jenkins had the right, either with or without her husband, to make any disposition of these slaves which she could have made had she been a single woman; that she had a right to give them to her husband, or to create by deed, as she has here done, a trust or use in his favor; and that the personal representative of the wife cannot, in a court of law, in the face of this deed, recover the slaves of the husband. That the husband, who was the wife's equitable trustee, joined in the transfer, makes no difference. The agreement, so far as the wife was concerned, was executed, and the property is where a court of chancery would place it, if the husband resorted to no coercion or undue influence to obtain the transfer or deed. This is not an attempt, therefore, to charge the wife, or her representative, upon her contract; but the husband alleges his possession to be lawful, not tortious, being secured in the use by the solemn act of his wife, upon which he has a right to repose. His possession and refusal to surrender the slaves is consequently no conversion.—See McCroan v. Pope, 17 Ala. 617; McGowan v.

Young, 2 Stew. & Por. 160; Lowremore v. Berry, 19 Ala. 130.

We see no reason why the wife may not dispose of her separate personal estate, as well by *deed*, as by writing not under seal, or by parol. The only effect of either mode of transfer is, to vest the property in the person to whom it is transferred. The wife is not personally chargeable, *at law*, upon any such contract; but, when executed, it is operative to pass her interest. It is also readily conceded, that where the title is vested in trustees for the separate use of married women, they can only transfer an equitable interest, and not one which, at law, can over-ride the title of the trustee.—Puryear v. Puryear, 14 Ala. 121. But in this case, the donor conveyed the property to the wife herself; and if we concede that she could not, by reason of her coverture, take the title *at law*, yet it would vest in the husband, he consenting to it; and he is a party to the conveyance by which his present use is secured.

In Hooper's Ex'r v. Smith and Wife, 23 Ala. 639, we held, that under the act of 1848, securing to married women their separate estates, a *feme covert* may sell, charge, or dispose of her property without the consent or concurrence of her husband. She need not resort to a court of equity for power to sell her personal chattels. She has the power to sell and dispose of them precisely as if *sole;* and it were vain to say she has the power and right to sell, and yet deny her the power of vesting a right in the purchaser. We decide nothing as to her power over her real estate, as that question is not involved.

The case cited by the counsel, of George v. Goldsby, 23 Ala. 336, has no reference to the *separate estate* of the wife, and consequently is not opposed to the views we have above expressed. Neither will we say, that where the property is vested in trustees, she can transfer a legal right to it. All we decide is, that where personal property is conveyed directly to the wife, to her sole and separate use, she and her husband can, by their joint deed, vest the legal title in trustees for their use and the use of the survivor for life; and that such deed may be set up by the husband who survives the wife, to defeat the action of trover brought by the personal representative of the wife.—See, as to the wife's power of disposition, McCroan v. Pope, 17 Ala. 617.

But it is said, this deed was never delivered, that the trustees never accepted the trust, and that there was no delivery of the slaves. To this we answer, it was admitted that the deed was *executed*, which implies a delivery. It was, moreover, introduced and read, as we have before stated, without objection, and as against him who read it, the opposite side has the right to regard it as legal testimony, and as available to the full extent of its legal effect as a valid subsisting deed, having been offered without restriction as to its effect as testimony. The *execution* of the deed rendered it unnecessary to make any formal delivery of the property. The law, moreover, does not require the mere useless ceremony of having the property delivered by the husband and wife to the trustees, that it might be delivered back immediately to them. That the trustees both executed the deed, is evidence that they consented to act and accepted the trust. As to the execution of the deed, see Puryear & Wallace v. Beard, trustee, 14 Ala. 121.

As to the two slaves sold by the husband while they were the separate property of Mrs. Jenkins, and before the deed by her and her husband to the trustees, we need only remark, that the wife's right of action was suspended during the coverture. If she had survived her husband, we entertain no doubt that she might have sued his personal representative for the conversion, if she did not expressly or impliedly consent to such disposition; and since death has terminated the coverture by her decease, we see no reason why her personal representative may not bring the action. If there be equitable sets-off, the party who insists upon them must go into equity for their allowance. We think the cases in our own court furnish abundant authority for sustaining the action. See Cook v. Kennerly, 12 Ala. 42; Puryear v. Puryear, *ib.* 13; 16 Ala. 491; Gunn v. Barrow, 17 *ib.* 747; Randall, adm'r, v. Shrader, 20 *ib.* 338; Powell v. Glenn, 21 *ib.* 458; Knight v. Bell, 22 *ib.* 198.

As to the damages: The true measure of damages, in an action of trover, where the thing converted has a fixed value, is that value at the time of conversion; and the jury may give interest upon it. If the value is fluctuating, the jury may take its highest value at any time between the conversion and

the trial.—Strong v. Strong, 6 Ala. 345; Tatum v. Manning, 9 *ib.* 149; Lee v. Matthews, 10 *ib.* 688-9; Ewing v. Blount, 20 *ib.* 694.

Let the judgment be reversed, and the cause remanded.

MILLER *vs.* JONES' ADMINISTRATOR.

1. The action of the courts of probate in granting letters testamentary, or of administration, though conclusive in those cases in which they have the power to act, may, like the sentences of all other courts, be assailed for want of jurisdiction; and whenever a suit is brought by a person upon his title as administrator, a plea averring facts which show that the court from which his letters issued had no jurisdiction to grant them, is good.
2. When a plaintiff declares upon his title as administrator by virtue of letters granted to him in this State, a plea averring that his intestate was not a resident of this State at the time of his death, and that he had no effects here at that time, does not show that the letters are void for want of jurisdiction in the court which granted them: the court of probate has jurisdiction to grant letters if property belonging to the estate is brought into the county after the intestate's death, although he was not a resident of this State and had no property here at the time of his death.—Clay's Digest, p. 303, § 33.
3. When application is made for letters of administration on the estate of a non-resident, if the petition alleges that "there is property within the county *belonging to the heirs of said estate*, which is likely to be wasted, or so disposed of as to be lost to the said heirs, unless some one should be appointed to administer upon said estate," such an allegation, *it seems*, is equivalent to an assertion of title in the estate; but whether it is or not is immaterial, as it is not the *allegation* in the petition, but the *fact* that there is property in the county belonging to the estate, which gives the court jurisdiction to grant letters of administration, and the applicant is not held down to the ground stated in his petition.
4. In detinue for a slave, if the damages are not proved, a nominal sum only should be given; and it is therefore error to instruct the jury, that, in the absence of proof as to the value of the slave's hire, they might give interest on the agreed value of the slave by way of damages.
5. A plaintiff in detinue may recover upon possession alone against one who has not as good a right to it as himself, and the defendant, in such case, cannot defeat his recovery by showing an outstanding title in a stranger, without connecting himself with it; but when the plaintiff's right of recovery is based on his title, it may always be disproved by showing title in another.
6. If one who has possession of a slave disclaims property in himself, and holds it for the estate of his father, he is estopped from denying the right of pos-

session to be in the estate; and his declarations, in disparagement of his own title, are admissible evidence against him, or one claiming under him, to show the character of his possession.

7. When the defendant in detinue claims under a purchase at sheriff's sale from one who was estopped from denying the right of possession to be in plaintiff's intestate, he cannot set up an outstanding title in a third person without connecting himself with it.

8. By the Civil Code of Louisiana (p. 521, ch. 23, § 2) slaves without written title may be prescribed by a possession of fifteen years; and slaves with written title (Art. 3444), by a possession of five years.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

DETINUE by Franklin G. Kimball, as administrator of Isaac Jones, deceased, against Thomas P. Miller, for a slave named Jane. The plaintiff's letters of administration, which were set out on oyer, were granted by the Probate Court of Mobile on the 28th day of December, 1852; and this action was commenced on the 30th of December in the same year. The defendant pleaded—

"1. That the plaintiff is not, nor ever hath been, administrator of the rights and credits, goods and chattels, which were of the said Isaac Jones, deceased, in manner and form as he hath alleged," &c.

"2. That the said Isaac Jones, deceased, had not, at the time of his death, a mansion-house, or any known place of residence, in the county of Mobile, or elsewhere in the State of Alabama; and that he did not die in the said county, or elsewhere in the State of Alabama, and had not any estate, or property, in the said county of Mobile, or elsewhere in the State of Alabama; and that the said Probate Court of Mobile county had no authority, or jurisdiction, to grant to said plaintiff administration of the goods and chattels, rights and credits of the said Isaac Jones, deceased; and so defendant saith, that said plaintiff is not, nor ever hath been, administrator," &c.

"3. That the said Isaac Jones, deceased, during his lifetime, resided in the State of Louisiana, and died in said State, more than eighteen years before the commencement of this suit, to-wit, on the — day of —— A. D. 1833, at West-Feliciana, to-wit, in the county aforesaid; and that the said Isaac

Jones, at the time of his death, had not any mansion-house, or any known place of residence, in the said county of Mobile, or elsewhere in the State of Alabama, and did not die in the said county of Mobile, nor elsewhere in said State of Alabama, and did not have any estate or property in said county of Mobile, or elsewhere in the State of Alabama; and afterwards, (and more than eighteen years after the death of said Isaac Jones,) to-wit, on the 28th day of December, A. D. 1852, in said county, one Julia P. Canfield presented and filed in the Probate Court of Mobile county her petition, wherein she stated to the effect following—that is to say, that she, the said Julia P. Canfield, who was about to leave the State, and Elizabeth Ann, the wife of Newton Vonfleet, who resided in the State of Mississippi, and Robert O. Jones and James P. Jones, of the parish of West-Feliciana in the State of Louisiana, were the only heirs of Isaac Jones, who died in the said last-mentioned parish and State about the year 1833; that her father *(died?)* leaving no will, and that letters of administration had never been taken out on his estate; that there was property within this county belonging to the said heirs of the said Isaac, deceased, which was likely to be wasted, or so disposed of as to be lost to the said heirs, unless some one should be appointed to administer upon said estate, to-wit, one mulatto girl, about eighteen years of age, and of the value (as petitioner believed) of about two thousand dollars;—and prayed the said court to commit the administration of said estate to the hands of such person, or persons as the said court might be pleased to select and appoint; and thereupon the said Probate Court afterwards, to-wit, on the — day of —— A. D. 1852, in said county, made an order appointing said plaintiff administrator of the goods and chattels, rights and credits, which were of said Isaac Jones, deceased, in his life-time;—all which will more fully appear by the record thereof, remaining of record in said Probate Court of Mobile county. And the defendant in fact saith, that the said Probate Court of Mobile county had no jurisdiction, or authority, to make said order, or to grant to said plaintiff administration as aforesaid; and so defendant saith, that said plaintiff is not, nor ever was, administrator," &c.

"4. That he doth not detain said slave," &c.

"5. That the said cause of action did not accrue at any time within six years next before the commencement of this suit," &c.

The plaintiff demurred to each one of these pleas separately, and his demurrer was sustained as to the second and third. The grounds of demurrer specified in the second plea are, "1st, because, though every allegation of matter of fact, upon which defendant bases his said allegation of want of jurisdiction in said Probate Court, were true, yet, if plaintiff's declaration be true, the said Probate Court had jurisdiction in the premises"; and, "2d, because, though it be true that said decedent, at the time of his death, was not a citizen of, and did not reside in, and had no property, estate, or effects, of any kind, nature, or description, in this State, yet, if after his death property belonging to his estate should be brought within the limits of the jurisdiction of the courts here, and the same should be here adversely held, or be wrongfully converted by strangers or third persons, the Probate Court of any county in this State wherein the same might be found would have jurisdiction to grant letters of administration, and letters of administration upon such a state of facts would be valid, and would confer upon the plaintiff the right to sue for such property; especially as said plea does not show a right of property, or a right to sue, in any body else than plaintiff; and so plaintiff says, that said second plea is bad, and no answer to his suit as administrator, &c." The same grounds of demurrer are specified, in short by consent, to the third plea.

The evidence which was adduced on the trial is all set out in the bill of exceptions, and shows substantially the following facts: The intestate died in Louisiana, in 1833 or 1834, possessed of several slaves, and leaving a widow and six children. Soon after his death his widow filed in the proper court, according to the Civil Code of Louisiana, a petition for a renunciation of the community of acquits and gains between herself and her deceased husband, praying that an inventory of his estate might be made, and claiming as her separate property the negroes of which he died possessed; and an inventory was accordingly made under an order of court, which shows that the intestate's separate property at

the time of his death, consisting of articles of household and kitchen furniture, was estimated at about $90. The slave now in controversy was born, after the intestate's death, of one of those which the widow claimed as her separate property. The widow subsequently married one Daniel O'Donoghue; and a suit arising between her and some of the intestate's children, the slave was run off from Louisiana by one Gayre, in consequence of said suit, and was afterwards delivered by one Wharton to Mrs. Julia P. Canfield, who was a daughter of the intestate. Mrs. Canfield brought the slave with her to Alabama, and had her in her possession in 1852, in Mobile county, when an attachment was levied on her, as the property of Mrs. Canfield, at the suit of Thomas P. Miller, the present defendant. Jones B. Canfield, who was a son of Mrs. Julia P. Canfield, and whose deposition was taken by the plaintiff, testified, that his mother never claimed the slave as her own property, but as the property of her father's estate; and that she told Miller, in the presence of witness, "that the girl did not belong to her, and that she held her as the property of the estate of Jones." The slave was sold at public auction, on the 24th of December, 1852, under an order of court rendered in said attachment suit, and was purchased by the defendant, for the sum of $850; and she was then delivered by the sheriff to said defendant, and a bill of sale executed for her. It was admitted that the value of the slave was $850, but there was no proof of the value of her hire.

For the purpose of showing what was the law of Louisiana in relation to the rights of married women, and the inheritance and succession of the estate of deceased persons, and in acquiring title to slaves by prescription, the defendant read in evidence to the jury, from the Civil Code of Louisiana, the following sections, viz., Nos. 866, 867, 870, 873, 875, 876, 877, 878, 881, 882, 883, 884, 898, 928, 929, 934, 935, 936, 937, 939, 996, 1007, 1008, 1010, 1034, 1049, 1088, 1089, 1090, 1105, 982, 1006, 1025, 1055, 2314, 2315, 2317, 2369, 2377, 2380, 2382, 3492, 3487, 3420, 3421, 3437, 3439, 3444, and 3447; and the plaintiff, for the purpose of showing what was the law of Louisiana in relation to the same subjects, and that the said laws were different from the law as contended for by defendant's counsel, read to the jury certain other sections from the

Civil Code of Louisiana; and the said Civil Code was declared by the court to be in evidence before the jury."

On this evidence the court charged the jury as follows:

"That to entitle the plaintiff to recover in this case, he must show that he is entitled to the possession, or that he has the title with the right of possession.

"That the question of title in this case was between the title or right of possession of the plaintiff and the title or right of possession of the said Julia P. Canfield, through whom the defendant claimed; and if the said Julia P. Canfield, whilst in possession of the slave sued for, stated that she held the said slave for the estate of said Isaac Jones, deceased, that declaration was evidence for the plaintiff that the possession she held was the possession of Jones' estate; and if Mrs. Canfield held the possession of said slave for the estate of said Jones, and if the said estate had the title or right of possession, the title of Mrs. O'Donoghue could not defeat the action, unless the defendant connected himself in some way with her title.

"That the defendant could not successfully defend himself in this action by showing an outstanding title in any third person, other than Mrs. Canfield, without connecting himself with such outstanding title.

"That by the laws of Louisiana, where no written evidence of title was shown, fifteen years' possession was necessary to give title to a slave by prescription.

"That, if the jury found for the plaintiff, they might give him hire for the negro whilst in the defendant's possession; and in the absence of any proof as to what was such hire, they might allow him interest on the agreed value of the slave.

"To all these charges the defendant excepted, and asked the court to give the following charges:

"1. That, if the jury believe from the evidence that plaintiff's intestate, Isaac Jones, resided and died out of the State of Alabama, and had not at the time of his death any mansion-house or known place of residence in the State of Alabama, and had no property or effects in the State of Alabama at the time of his death, the Probate Court of Mobile county had no jurisdiction, on the 28th December, 1852, to grant letters of administration on his estate to the plaintiff, and the

grant of letters of administration by said court to the plaintiff was void, and plaintiff was not (and is not) in law, by force of that grant, the administrator of the estate of said Isaac Jones, deceased, and the jury should find for the defendant.

"2. That, if the jury believe from the evidence that the slave sued for in this action was born after the death of Isaac Jones, deceased; and that said Jones lived and died in the State of Louisiana; and that by the laws of Louisiana, as in evidence before the jury, and by the other evidence before them, they further believe that the mother of the said slave was not the property of the said Isaac Jones, deceased, but was the separate property of the wife of said Jones,—then the jury should find for the defendant.

"3. That, if the jury believe from the evidence that the slave sued for was held in the State of Louisiana, for more than five years before the bringing of this suit, adversely to the claim of the heirs and other representatives of the said Isaac Jones, deceased; and that by the laws of Louisiana, as in evidence before the jury, such adverse possession gave a title by prescription to the slave to the person so holding such adverse possession,—then the plaintiff cannot recover the said slave in this action, and the jury should find for the defendant.

"4. That in this action the defendant may show, under the pleadings, an outstanding title in any third person; and if, from the evidence, such outstanding title in a third person is shown, the plaintiff cannot recover.

"5. That the fact that the defendant sued out an attachment against Julia P. Canfield, and under that attachment the said slave now sued for was levied on by the sheriff in the possession of said Julia P. Canfield, and was afterwards sold by the sheriff under an order of court made in said attachment suit, and at such sale was bought by the defendant, and was delivered to him by the sheriff,—these facts do not prevent the defendant from defending himself in this case by showing an outstanding title in any third person."

The court refused each one of these charges, and the defendant excepted to each refusal; and he now assigns for error the rulings of the court, as above set out, in sustaining the

demurrers to his second and third pleas, in the charges given, and in the refusals to charge as requested.

WM. BOYLES and WM. G. JONES, for the appellant:

1. The grant of letters of administration to the plaintiff was made by a court having no jurisdiction: it was not merely voidable, but absolutely null and void; and so the plaintiff was not, and is not in law, the administrator of Isaac Jones, deceased. In England, the granting of administration appertained, according to circumstances, either to the Ecclesiastical Court of a bishop, or of an arch-bishop. If it was made by a court not having jurisdiction, it was absolutely void.—1 Williams on Ex'rs, 175, 181, note y; Prince's case, 5 Coke's Rep. 30; The King v. Sutton, 1 Saund. R. 274, note 3, and 275, note c. The same doctrine has been repeatedly held in the United States.—Griffith v. Frazier, 8 Cranch 9; *Ex parte* Baker, 9 Leigh 719; Wales v. Willard, 2 Mass. 120; Sigourney v. Sibley, 21 Pick. 101; Ewing v. Sneed, 5 J. J. Marsh. 459; Creath v. Brent, 3 Dana 129; Wilson v. Frazier, 2 Humph. 30; Echols v. Barrett, 6 Geo. Rep. 443; Slade v. Washburn, 3 Ired. 557; Springs v. Erwin, 6 *ib.* 27; Johnson v. Corpenning, 4 Ired. Eq. 216; Gayle & Pitts v. Blackburn, 1 Stew. 429.

The Probate Court in Alabama is a court of limited and special jurisdiction. Hence its jurisdiction to make any order must be shown by the record; and if it makes an order in a case in which it has no jurisdiction, such order is not merely voidable, but absolutely null and void.—Gayle & Pitts v. Blackburn, 1 Stew. 429; Taliaferro v. Bassett, 3 Ala. 670, 674; Johnson and Wife v. Collins, 12 *ib.* 322; Bishop's Heirs v. Hampton, 15 *ib.* 767. The grant in this case was made on the 28th December, 1852, before the new Code went into operation. The Probate Court had no jurisdiction, except such as was conferred by statute. These statutes are found in Clay's Digest 301, § 22, and 303, § 33: they give jurisdiction to grant letters of administration—1st, to the Probate Court of the county in which the decedent had a mansion-house or known place of residence; 2d, if he had no such place of residence, to the Probate Court of the county in which he died; or, 3d, in which his estate, or the greater part thereof,

shall be. This case does not come under either of these heads. The law provides for administration, where any person died in this State, or died out of the State, having property in this State at the time of his death. It did not provide for the case of a foreigner, living and dying out of this State, and having no property in this State. This is the manifest meaning of the words and spirit of the statute. The same statute has been expressly held in Mississippi not to apply to cases in which the decedent had no property in the State at the time of his death, though property which had belonged to him was afterwards brought into the State.—Wright v. Beck, 10 S. & M. 277, 281.

When a plaintiff sues as administrator, the defendant may, by special plea, set out facts showing that the grant of administration to the plaintiff was void, either for want of jurisdiction in the court making it, or for any other cause. The same facts may sometimes be shown under the general plea of *ne unques administrator;* and where (as in this case) the property never was in possession of the decedent, or the administrator, they would probably be a good defence under the general issue of *non detinet*, which puts the plaintiff on proof of his title.—2 Stark. Ev. 315, 317; 3 Chitty's Pl. 940-1, and notes; Stokes v. Bates, 5 B. & C. 491; 2 Greenl. Ev. 341-2.

If these principles are correct, the court erred in sustaining the demurrers to the second and third pleas, and also in refusing to give the first charge asked by the defendant.

2. As Isaac Jones lived and died in Louisiana, leaving his property in that State, and his widow, his children and heirs living in that State, the right and title to such property are governed by the laws of Louisiana. By the laws of Louisiana, a married woman may have and hold property separately from her husband. If after his death she renounces the acquits and gains of the common property, and causes an inventory of his property to be made, she is entitled to take and hold her separate property.—Civil Code of La., arts. 2314, 2315, 2379, 2380, 2382, 2384. The evidence is positive, that the negro Jane was not born until after Jones' death; and it conduces to show, that the mother of Jane was the separate property of the widow, and was claimed and held as such by the widow for many years, (more than five years,) in Louisiana,

adversely to the heirs of Jones, who lived also in that State. The effect of this claim and possession of the widow is not weakened by the fact of there having been no administrator of Jones' estate appointed in Louisiana. There was no necessity for any such appointment: by the law of Louisiana, the right and title to all the estate, real and personal, of a decedent, is cast on the heir by the mere operation of law, just as real estate is by the common law; and the heir may sue for any of it immediately.—Civil Code La., arts. 866, 867, 870, 873, 875, 876-884, 898, 928, 929, 934, 935, 936, 939, 1007, 1010, 1088, 1090. The heirs of Jones then, immediately upon his death, and without any grant of administration, might have sued in Louisiana any person holding any of Jones' property, real or personal, adversely to them. By the Louisiana law, title to slaves is acquired by prescription, by an adverse possession of five years in good faith (Civil Code La., arts. 3420, 3436, 3437, 3438, 3439, 3444, 3445, 3447); and prescription runs even against a vacant succession (*Ib.*, art. 3492.) The evidence conduced to show, first, that the slave never was the property of Jones, or of his estate, but was the separate property of the widow; or, even if this was not sufficiently shown, it conduced to show, secondly, that the widow claimed and held it in good faith adversely to Jones' heirs in Louisiana, for such a length of time as gave her a title by prescription. That this is a good defence, against a suit brought by Jones or his representatives, for the property in this State, is well settled.—Goodman v. Marks, 8 Porter 84; Howell v. Hair, 15 Ala. 194; Jones v. Jones, 18 *ib.* 248, 253; Newcombe v. Leavitt, 22 *ib.* 631.

3. In detinue, the defendant may defeat the plaintiff's action by showing an outstanding title in a third person.—Dozier v. Joyce, 8 Port. 303; McCurry v. Hooper, 12 Ala. 823; Tanner v. Allison, 3 Dana 422.

4. There was nothing in the proceedings of Miller under the attachment to constitute him a trespasser, so as to prevent him from defending himself in this case by showing a superior outstanding title in a third person.

5. There was no evidence whatever given to the jury as to the hire of the negro, or the worth of her hire or services whilst in the defendant's possession. It was undoubtedly

error for the court to charge that, in the absence of any such proof, the jury might give interest on the agreed value, in lieu of hire.

JOHN T. TAYLOR, *contra*:

1. The letters of administration were not void on the ground that there was no property in the county of Mobile at the time they were granted. It is true, the record in one place alleges that the slave Jane, the property in question, was the property of the heirs of Jones, instead of alleging it to be the property of his estate; but it is clear, on a proper view of the whole record, that the latter allegation was intended,—that the proof sustained it, and that the court viewed it in that light, and assumed jurisdiction on that ground. Nor were the letters void on the ground that there was no property in the county at the time of the death of Jones. The proper and only reasonable construction of the section of the act relied on by the appellant, is, that there shall be property in the county at the time the letters issue. But, giving to the section the construction for which the appellant contends, still it does not affect this case. General powers in all orphans' court matters are given to the probate judges; and by section 31 (Clay's Dig., p. 303) and the 8th section of the act of 1850 (p. 22), the jurisdiction to issue letters of administration is unrestricted, and given to all the county-court judges. If this section stood alone, the powers in this case could not be denied. The 22d section of the act in Clay's Digest (p. 301) merely restrains the general power in certain cases: when a person dies out of the State, and has no residence in the State, but has property in a particular county at the time of his death, then the court of the county in which the property is shall have the prior and only right to issue letters; but in a case where the intestate does not die in this State, and has no place of residence in this State, and no property here at the time of his death, then this 22d section, if the appellant's idea of it be correct, does not bear upon it, and leaves the general power given by the 31st section in full force. The 22d section is simply to establish prior rights, in certain cases, in certain counties. My position, then, is this: In a case where the deceased died out of the State, and had no residence

and no property in the State at the time of his death, and no letters have been granted in any other county in this State or any other, and property is afterwards found in one county in this State, and no fraud is charged,—then the Probate Court where the property is at the time the letters issue has jurisdiction whenever a necessity is shown. In this case a necessity is shown, by the statement in the record that the property would be lost or converted unless an administrator was appointed to protect it. Besides, the record does not show that the property was in Louisiana at the time of the decedent's death: it uses the words of the act, and must bear the same construction, and therefore be understood to allege that the property was in Alabama at the death.

2. The proof shows that Mrs. Canfield received the property from and as belonging to the estate; that she never claimed it as her own, but held it as the estate's; and that the appellant levied on it as Mrs. Canfield's, had it sold as hers, and bought it, knowing the character of her possession. Mrs. Canfield was clearly estopped from setting up an outstanding title, and the appellant cannot assume a better position than she had.

3. But, even if the appellant should be allowed to make this defence, he entirely failed to make it out; and the court therefore correctly refused the charges asked on this point. The proof is positive that the legal title was in Jones; and the court will see that, giving to the appellant's evidence its fullest scope, it only shows a claim or assertion of title, without any proof of a title in fact. It is true, the evidence alludes to a slave named Jane, once in possession of Mrs. O'Donoghue; but if this is the negro now sued for, which is not shown, still she got the possession from Jones, or took it after his death. But (it is said) she kept this possession until it ripened into a title by limitation under the laws of Louisiana; and the court was asked to charge, that five years would give title under that law. This charge was properly refused, on two grounds, viz., 1st, the full possession was not proved; and, 2d, because it required fifteen years instead of five, (Civil Code, arts. 3433, 3437, 3438, 3439, p. 521,) and one setting up this prescription must prove a continuous, uninterrupted possession for the full time; which was not done in this case.—Art. 3466,

p. 525. The statute of five years only applies where a written title is shown and proved.—Arts. 3437, 3439, 3452.

GOLDTHWAITE, J.—In England, as the power to grant letters testamentary, or of administration, is lodged exclusively in the Ecclesiastical Courts, the act of those courts in cases in which they have the power to act, has always been held conclusive. (Cow. & Hill's Ph. Ev., 1 vol. 343); and the same rule is applied in the same cases in this country, to those courts to which this power is given by statute.—Wells' Will, 5 Litt. 274; Brown v. Gibbon, 1 Nott & McC. 236; 1 Pick. 535, 541; 14 *ib.* 280. But the sentences of these courts, like those of every other court, are assailable for want of jurisdiction, and whenever a suit is brought by one on his title as administrator, if the facts in the plea show that the court which granted the letters had no authority to act, the plea is good.—Buller, J., in Allen v. Dundas, 3 Term R. 130; 2 Cow. & Hill's Ph. Ev. 364. The ground on which the second plea rests is, that the court had not the power to grant letters in any case where the decedent was not a resident of, and had no effects in this State at the time of his death; but in Robinson v. Robinson, 11 Ala. 947, we held directly the contrary, and we are satisfied with the correctness of this decision. The case last cited disposes of the second plea, and makes the third rest, alone, on the fact that the application for letters did not allege that there was any property belonging to the estate of the deceased within Mobile county. We incline to the opinion, that, looking at the whole application, and applying the rules of construction with the liberality which we think should obtain in regard to proceedings in the Probate Court, the allegation of property in the heirs was equivalent, under the circumstances, to an assertion of title in the estate. But it is unnecessary to go so far; for we are satisfied, that, giving to the application the construction contended for by the appellant, the applicant would not have been held down to the ground stated in the petition. It was not the allegation of the petition which gave the court authority to act, but the fact that there was property belonging to the estate of the decedent within the State at the time the letters were issued; and as the plea does not negative the existence

of this fact, it fails to show the want of jurisdiction. The view we have taken is conclusive as to the second and third pleas and the first charge requested.

In relation to the other points: The case must be reversed on the instructions given to the jury, that in the absence of any proof as to what the hire of the slave sued for was worth, they might give interest on the agreed value of the slave by way of damages. The damages, in an action of detinue, are for the detention of the thing sued for; and in case of slaves, the value of the hire is the best, if not the only criterion of the injury occasioned by the detention. These damages should be proved, and if not established by the evidence, a nominal sum only should be given. It is true, that the hire of slaves is generally worth the interest on the money; but upon the same principle, if a slave was generally worth one hundred dollars, or a horse thirty, we might dispense with any proof of the value whatever. Such a rule would be entirely too loose, especially in cases in which more satisfactory evidence could always be offered; and in such cases the failure to offer testimony would, upon a familiar principle, operate against the party on whom the law cast the *onus*. The measure of value which the law fixes for the use or detention of money, cannot, with any propriety, be applied as the rule of compensation for the use of a slave.

The question we have just determined not going to the merits of the case, it is proper, with reference to the conduct of the cause on another trial, to consider the other questions presented upon the record; the principal of which is, as to the right of the appellant to set up the title of Mrs. O'Donoghue in order to protect himself. In discussing this question, we do not consider it necessary to pass upon the evidence contained in the record. It was treated by the court below as conducing to establish such a title, and we shall so consider it.

It is certainly true, that in the action of detinue, the plaintiff may recover upon possession alone, against any one who has not as good a right to the possession as himself. He recovers on the right he has to have the thing delivered to him. Where the possession alone would entitle the plaintiff to a recovery, we do not see how the other party could defeat it,

by proving title in a stranger unless he connected himself with it, thus proving that he had the better right. But where the claim is based not upon possession, but on the title, there the claim may always be disproved by showing that the title is not in the plaintiff, but in another. Thus, if the plaintiff was to show that he was the owner at a period anterior to the suit, the defendant might well show that he had parted with the title before the commencement of the action, and thus defeat a recovery,—not by showing any right in himself, but by proving that the other party did not occupy a position which would entitle him to recover. In the present case, therefore, the defendant below might properly have set up the title in Mrs. O'Donoghue, unless he was estopped by the act of the party under whom he claimed, or unless the possession of the plaintiff prevented him. Conceding that Mrs. Canfield actually held the possession of the slave for the estate of Jones, we think she would be estopped from denying the right of possession to be in that estate, because such a denial would be inconsistent with the relation she occupied. It is clear, also, that her declarations to that effect, while in possession of the property, would be evidence as to the character of her possession,—not conclusive,—but entitled to such weight as, under all the circumstances, they deserved; but if they satisfied the jury of the fact that she so held, then her possession would be the possession of the estate, and the appellant, claiming through her and obtaining her right only, could not set up a title in a third person, at least without connecting himself with it.

Applying these principles to the charges given, the first charge was correct. The second was erroneous, as it asserted, in effect, that although the claim of the plaintiff was based upon neither the title nor the possession of the estate of Jones, a recovery could be had upon the evidence disclosed by the record. We say this was the effect of the charge, for the reason that, if the evidence proved that Mrs. O'Donoghue, as the wife of Jones, held a separate estate in the mother of the slave sued for, then, on the death of Jones, by renouncing the acquits and gains of the common property, and causing an inventory to be made of the property of her deceased husband, she acquired a perfect title to her separate property

(Civil Code of Louisiana, arts. 2314, 2315, 2379, 2380, 2382, 2384); and if the jury did not find that Mrs. Canfield held the possession of the slave for the estate of Jones, the right of the administrator to recover would turn upon the fact as to whether the title was in the estate; and this would be disproved, by showing the title to be in another, without connecting himself with it.

In relation to the laws of Louisiana upon the question of title by prescription, we think the ruling of the court was correct. By the Civil Code of that State, (Art. 2415,) it is required that all sales of slaves "shall be made by authentic act, or under private signature"; and all verbal sales of that species of property are declared null. By reference to the several articles of section 2, chapter 23, (page 521,) it will be seen, that slaves without title cannot be prescribed, except by a possession of fifteen years. Article 3444, which was relied on by the appellant, allows a prescription for slaves with title by a possession of five years; but we construe this article with reference to article 2415, which, in effect, declares verbal titles to be void.

What we have said will be sufficient for the correct conduct of the cause upon another trial, upon the questions presented by the present record.

Judgment reversed, and cause remanded.

WALKER, EXECUTRIX, *vs.* WALKER'S DISTRIBUTEES.

1. The assent of an executrix to a specific legacy to herself of a life estate in two slaves, will be presumed, when the facts are, that she is the widow of the testator; that she did not dissent from the will, although it would have been greatly to her pecuniary advantage to do so; that she promptly qualified as executrix, and kept the estate together (under the will) for three years, for the purpose of raising and educating the children; that in the meantime, by her industry, economy, and prudent management of the estate, she totally exonerated it from all indebtedness; and that she ceased to be executrix after all the debts were paid, and claimed a credit on final settlement of her administration for services rendered by said slaves to the estate after the testator's death.

2. In such case, her assent, though not given until all the debts of the estate were paid, or even until the day before she ceased to be executrix, relates back to the testator's death, and she is entitled to a credit for the value of the services of the slaves to the estate, as proved, from the testator's death.

3. An executrix held entitled to a credit, on final settlement, for lawful jail fees paid by her to regain the possession of certain slaves belonging to the estate, who had been taken up and committed to jail as runaways, when the evidence showed the following facts: That the executrix was the widow of the testator, and no other person than herself and her children was interested in the estate; that the estate was kept together under the will, and the plantation kept up and cultivated; that the overseer employed by her was cruel and severe towards the slaves, and several of them had previously run away on account of his cruelty, and had been taken up and committed to jail, "for which and other jail fees allowance had been made"; that said overseer made good crops, but was finally discharged by the executrix, in the fall of the same year, on account of his severity to the slaves.

APPEAL from the Court of Probate of Macon.

IN the matter of the estate of Edwin C. Walker, deceased, on the application of his executrix for a final settlement of her administration.

The testator died in September, 1847, after having executed his last will and testament, in which he appointed his wife his executrix, and which contains the following clauses:

"Item 1. After all my just debts are paid, it is my will and desire, that the remainder of my property, both real and personal, shall be kept together for the benefit of raising and educating my children, and remain so until my wife Julia Ann does marry, or either of my daughters does marry or become of age. In case there should be a division, by marriage or otherwise, it is my will and desire, that the younger children's part of my estate should be kept together as a joint property for their benefit. Should I not purchase a farm before my death, it is my will and desire, that my executrix or administrator should purchase a farm, sufficient to work my hands, out of any moneys that may belong to my estate; and the remainder and overplus, after the support of my family, to be expended for negroes, or any other property, for the benefit of said joint estate, or of the children's estate, as the case may be.

"Item 2. It is my will and desire, that Thomas P. and William S. Miller shall have, out of the joint funds of my

estate, one thousand dollars each, to be given to them by my executrix, &c.; to be paid to them at the time they may become of twenty-one, discretionary with my executrix, or at the age of twenty-five, of each legatee mentioned in this item.

"Item 3. It is my will and desire, that my wife Julia Ann shall have, during her lifetime, negro man Arnold, about forty-five years old, and his wife Hannah, about thirty-five years old, and an equal distributive share of the remainder of my estate, both real and personal, with my children, during her lifetime, and at her death to be divided equally among my surviving children.

"Item 4. It is my will and desire, that the remainder of my estate be divided equally among my children, as specified in the second item; my daughters' part to be settled on them, during their lifetime, for the benefit of them and their heirs, in the hands of some qualified trustee, for their use alone. In case either of my daughters die without lawful issue, then their portion (shall?) be equally (divided?) between my surviving children.

"Item 5. Whenever a division may take place of my estate, it is my will and desire, that the lands shall be valued, and the amount of the legatee's or legatees' part to be paid to them out of moneys arising from the younger legatees' joint estate, if it can be done without sacrificing or selling their negroes."

This will was attested by only two witnesses, and was admitted to probate on the 14th September, 1847. The widow qualified as executrix on the 18th October, 1847, and had charge of the estate from that time until some time in 1852 (the record does not state the precise time.) On the final settlement of her administration, at the June term, 1853, she claimed a credit of $750 for services rendered to the estate by the said slaves Arnold and Hannah; and presented three vouchers for money paid to one W. F. Wade, amounting to $34 50, jail fees for runaway negroes belonging to the estate. The evidence in relation to each one of these items is stated at sufficient length in the opinion of the court, and for that reason it is omitted in this place. The court refused to allow any one of these credits, and the executrix excepted to each refusal; and these rulings of the court are now assigned for error.

GEO. W. GUNN, for the appellant:

From the provision contained in the third item of the will, no doubt can be entertained as to when the right and enjoyment vested: it is evident that the testator intended to confer upon his wife, during her life, the slaves named, over and above what each one of his children should take, and that the same should vest in her at his death; and such being his intention, the same should prevail. When a legacy is given generally, without appointing the time for its enjoyment, it vests immediately upon the testator's death.—Frierson v. Frierson, 21 Ala. 549; Capal's Heirs v. McMillan, 8 Port. 197; Hunter v. Green, 22 Ala. 336.

It is insisted, however, that the second clause requires the estate to be kept together, and that, giving effect to the whole will, the widow is not entitled to the enjoyment of the services of these slaves until a distribution shall have been had under the provisions of this second item. If there is any conflict or repugnancy in the will, it will be found in these two provisions; and if such repugnancy exists, the latter clause must prevail.—1 Jarm. on Wills, pp. 393 to 403; 22 Ala. 336; 5 *ib.* 143; 2 Stew. 170. But, since the law requires all the provisions of the will to be reconciled, if possible, the question arises, whether or not these two clauses can be reconciled with each other, and with the other provisions of the will. For the appellant it is contended, that this may be done, by decreeing to the widow the present enjoyment of these two slaves, and allowing hire for their services. A different construction would defeat the testator's evident intention to give the widow the additional advantage of the services of the slaves over and above each of his children. To say that the use of the property, with the right, did not vest in her until a distribution of the estate, would not only sacrifice the third clause to the second, but would sacrifice the specific bequest in the third clause to the general bequest in the second; and this is not allowable.—21 Ala. 549; 5 *ib.* 143. The provisions of this will differ from that in the case of McLeod v. McDonnell, 6 Ala. 236, and more nearly resemble that in Frierson v. Frierson, 21 Ala. 549.

If this construction be the correct one, there can be no doubt, under the facts disclosed by the record, of the error in the

refusal of the court to allow the widow credit for the services of the slaves. The proof is, that they were profitably employed in the service of the estate, and that their services were worth to the estate $250 *per annum;* and further, that she acted in good faith, and freed the estate, partly by the services of these slaves, of large and heavy debts then hanging over it.

The court erred, also, in refusing to allow the appellant credits for the three vouchers paid to W. F. Wade. The proof shows, that she acted in good faith; that by means of her industry, economy, and prudent management, she relieved the estate from the embarrassment in which the testator left it; that she discharged the overseer because of his cruelty to the slaves; and it fails to show that she had notice of his cruelty until after the demands in question became a charge against the estate. It was necessary for her to pay these demands, in order to get possession of the slaves taken up; and there can be no justice in requiring her to pay them out of her own funds. All reasonable and proper allowances should be made in favor of an executrix thus circumstanced.—Pinckard's Distributees v. Pinckard's Adm'rs, 24 Ala. 250; Moore's Executors v. Moore's Distributees, 18 *ib.* 242.

CLOPTON & LIGON, *contra:*

The appellant being both executrix and legatee, her possession of the negroes during her administration of the estate will be referred to her right as an executrix, and not as legatee, unless she has done some act equivalent to an assent to the legacy; and, if her acts are equally applicable to her character as executrix, as to her title of legatee, they will not constitute an implied assent.—2 Lomax on Ex'rs, p. 133. The estate is shown to have been in debt; and whilst the bill of exceptions states that she has freed it from debt, yet it does not state the time when these debts were paid. From the account current of the executrix set out in the record, we discover that she was paying debts as late as August, 1852. She would certainly be considered as holding the negroes in her right as executrix so long as there were debts unpaid. Whilst she held them as executrix, the estate would be entitled to the proceeds of their labor: she would not be permitted to

take these proceeds, until she elected to take them as a legatee. For these reasons, the allowance asked for the hire of said negroes ought to have been refused.

If, however, the above conclusion is not correct, the allowance was properly refused, for another reason: The allowance was asked for the sum of $750, the full value of their hire from the time she took charge of the estate as executrix until the time of her final settlement; and she was certainly not entitled to hire for the first eighteen months. The statute giving to a legatee the right to sue for his legacy, at common law, limited that right to the expiration of eighteen months from the probate of the will. Having no right to sue for it, or, by parity of reasoning, no right to take the negroes as a legatee, she has no right to their hire during that period.

But, if the judge below was wrong in the reasons and principles upon which he refused the allowance, the result which he attained was nevertheless correct, and the executrix was not entitled to an allowance for the hire of the negroes, for the reason, that, upon a proper construction of the will, said negroes were to be kept together with the balance of the estate, until the period for a division fixed in the will had arrived. Every attempt will be made to give the whole will such a construction as will render each part of it effectual; and, in the attainment of this object, the local order of the limitations is disregarded, if it be possible by a transposition of them to deduce a consistent disposition from the entire will. 1 Jarm. on Wills, pp. 415-16; Walker v. Walker, 17 Ala. 399; Stallsworth v. Stallsworth, 5 *ib.* 146; 2 Paige 122. The general intent, although first expressed, will overrule the particular. This is now well established.—1 Jarm., p. 411, note, and cases cited; 2 Williams on Ex'rs 714; 11 Gill & J. 206.

Applying these principles to the construction of this will, it seems evident, the intention of the testator was that these two negroes should remain and be kept with the residue of his estate, for the benefit of raising and educating his children, until his widow married, or either of his daughters married or became of age, when a division was to take place. What was the general intent of the testator, as ascertained from a construction of his whole will so as to make one part harmonize with the others? In the first clause of

his will, he provides for keeping his estate together, after paying his debts. When, however, his widow married, or either of his daughters married or became of age, his estate was to be divided; and, in the third and fourth clauses, his object was, to arrange the manner in which that division was to be made—that is, Arnold and Hannah were to be taken out of the estate, and then the remainder to be equally divided between his widow and children. This manner of a division is provided for in two separate clauses, because he intended his widow to have only a lifetime estate in her portion. This construction is further supported by the fact, that, in the same clause in which he gives his widow Arnold and Hannah, he also gives her an equal distributive share in the remainder of his estate. The construction which gives her a right to the possession of Arnold and Hannah immediately upon the probate of the will, or earlier than the period fixed in the will for a division, will also give her a right to the same possession of an equal distributive share in the residue of his estate, and thus defeat the object of the testator to keep his estate together.

The other allowances, asked by the executrix for payments made to W. F. Wade for apprehending and committing runaway slaves, were properly refused, for the reason, that these slaves ran away on account of the cruel treatment of an overseer, who was retained by the executrix; and that, too, after she had been compelled to pay other fees of a similar kind in a previous year, (which had been allowed her in former annual settlements,) and which were also caused by the cruel treatment of the same overseer. These expenses were incurred by the improper and cruel treatment of her own agent, and by her disregard of her duty to protect said property.

RICE, J.—The bequest of the two slaves Arnold and Hannah, contained in the will of Edwin C. Walker, to his wife during her lifetime, is a specific legacy. Upon the evidence set forth in the record, the court below decided, that she was "entitled under the will to the possession and services of said two slaves, but as she had permitted them to remain in the service of said estate, of which she was possessed as executrix, and not having signified her assent in any manner

to take them as a legatee, she was not entitled to an allowance for their services." It becomes our duty to inquire whether this decision is correct.

We admit, that the assent of an executor is as necessary to a legacy bequeathed to himself, as to a legacy bequeathed to any other person; but this rests on the principle, that until he has examined the state of the assets, he is incompetent to decide whether they will admit of his taking the thing bequeathed as a legacy, and whether it must not of necessity be applied in satisfaction of debts.—2 Williams on Ex'rs 850. It is *as a protection to the executor*, that his assent to a legacy is required by law.—*Ib.* 843, 844.

His assent may be either express or implied. When the legacy is to himself, he may not only in positive terms announce his election to take it as a bequest, but such election may also be implied from his language or his conduct.—2 Williams on Ex'rs 850, 846. Any expression or act of the executor, which shows his concurrence to the thing bequeathed, will amount to an assent.—4 Bacon's Abr. 112. A small matter will amount to an assent—an assent being but a rightful act; especially where the estate is clearly solvent, and there is no probability that the legacy will be needed to pay the debts of the estate.—6 *Ib.* 331.

In certain cases, the assent of the executor may be presumed, upon the principle that, in the absence of evidence, the executor shall be taken to have acted in conformity with his duty; as when an executor *dies after the debts are paid*, but before the legacies are satisfied. So, the assent of an executor may be concluded from the legatee's possessing himself of the subject bequeathed, and retaining it for some considerable time without complaint by the executor.—2 Wms. on Ex'rs 848. And so, (we feel safe in adding,) the assent of an executrix to a specific legacy of a life estate in two slaves to herself, ought to be presumed, when the facts are, that she is the widow of the testator; that she did not dissent from the will within the year after its probate, as she might have done, under the act of 1812, (Clay's Dig. 172-3,) greatly to her own pecuniary advantage; that she promptly qualified as executrix, and for at least three years continued as such to keep the property together (as directed by the will) for the purpose of raising,

educating, and benefiting the children of the testator; that in the meantime, by her industry, economy, and skilful management of the estate, she has totally exonerated it from all indebtedness; that in all these matters she acted in good faith; that *after all the debts of the estate were paid* as aforesaid, she ceased to be executrix; and that in her account current for a final settlement of her administration, she claimed a credit or allowance for a certain amount for the services rendered to the estate by the two slaves specifically bequeathed to her as aforesaid, since the death of the testator.—Gantt v. Phillips, 23 Ala. 275. From these facts, we feel bound to presume the assent of the executrix to the specific legacy of the said two slaves to herself.

It makes no difference, in this case, when that assent was given; for, if not given *until after all the debts were paid*, nor until the day before she ceased to be executrix, it had relation to the time of the testator's death, and entitles her to an allowance against the estate for the amount she proved the services of these two slaves to have been worth to the estate since the testator's death.—2 Wms. on Ex'rs 849, 850, 876, 877.

The Probate Court erred in refusing this allowance to the appellant.

We now proceed to inquire, whether the Probate Court decided correctly, in refusing to the executrix any credit or allowance for the lawful jail fees set forth in the bill of exceptions, which she paid to the jailor of Macon county to regain the possession of certain slaves of the estate, who had been arrested and lodged as runaway slaves in the jail of said county in August and September, 1852.

If the executrix, after ascertaining that these slaves were in jail, had, without some legal excuse, permitted them to remain there, thus increasing the jail fees, and depriving the estate of their services, she would have been guilty of a violation of her duty. No reason, or excuse, is shown why she should not have taken them out of jail. She could not get them out, without paying the jail fees. Yet the court below has, in effect, decided that, although she did pay the fees, and thereby restored the slaves to the service of the estate, she shall lose the money thus paid for the benefit of the estate.

The record shows, that the testator left his estate much in

debt; that he directed his property to be kept together until the occurrence of one of several specified events; that neither of the events thus specified has yet occurred; that the executrix is the mother of his children; that she has kept the property together, and freed the estate from debt; and that she and her children are the only persons who can possibly lose anything by the abuse of the slaves, or by any other improper management of the estate. The record also shows, that in 1852, and prior thereto, the executrix had in her employ an overseer who was cruel and severe upon slaves; that some of the slaves had been severely whipped by him, and several of them had run away in consequence of his cruelty, and been taken up and committed to jail, for which and other jail fees allowance had been made; that these things had occurred before the particular slaves ran away for whose jail fees a credit or allowance was now claimed by the executrix; and that said overseer made good crops, and continued in the service of the estate until in the fall of 1852, when he was discharged by the executrix on account of his severity to slaves. Such is, in substance, all the evidence relating to the decision now under consideration.

An executrix, in this State, has all the rights and powers which she has by the common law, except so far as those rights and powers are abridged or modified by statute.—Woolfork v. Sullivan, 23 Ala. 548. Under such a will as that of the testator in this case, the law allows a large discretion to the executrix, in the management of the estate, and in the selection of overseers. In the exercise of this discretion, she is not to be subjected to liability, if her acts are not unlawful, and are attended with reasonable diligence and good faith.—Hext v. Porcher, 1 Strob. Eq. 170.

Whether the executrix acted properly or improperly in employing such an overseer as she did employ, we do not feel called on now to decide; for, if it be conceded that, in employing him, she acted improperly, we all agree that the evidence does not prove that the running away of the particular slaves as to whom the jail fees in question were paid, was the proximate result of her act in employing him.—Jones v. Donnell, 13 Ala. 491; Sedgw. on Dam. 74-5; Vickars v. Wilcocks, 8 East's R. 1; 2 Greenl. Ev. § 256.

Without deciding whether there are not other valid legal reasons, which would induce us to hold the action of the court below erroneous, in refusing to the executrix any allowance for the jail fees specially set forth in the bill of exceptions, to-wit, those paid by her in August and September, 1852, it is clear from the single ground above stated, that the Probate Court erred in this refusal. And for the errors in the several rulings above considered, the decree of the Probate Court is reversed, and the cause remanded.

ADAMS AND WIFE *vs.* ADAMS.

1. A promise by defendant, upon valuable consideration, to give his daughter, who was plaintiff's wife, "a full share of his property, which then and there was worth $25,000", is too indefinite and uncertain to support an action under the Code.
2. *It seems*, however, that a promise by a father, upon valuable consideration, to make his daughter equal in property to his other children, (or to give her so much as would make her share equal to a given portion of his estate; as, one-fourth, one-fifth, &c.,) is sufficient to support an action, if the parties contemplated its present execution upon the performance of the consideration.
3. Such a contract, although its execution may be postponed by circumstances beyond a year and a day, and although the defendant's estate consists entirely of lands, is not within the statute of frauds.
4. When a contract admits of two constructions, one of which will destroy, and the other uphold it, the latter construction must prevail.
5. When no time is specified for the performance of a contract, the law requires that it shall be performed within a reasonable time.
6. When plaintiff below is appellant, and assigns for error the overruling of his demurrer to the plea, the judgment will be reversed, and the cause remanded, if the plea is bad, although the complaint also was demurrable.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action (Spencer Adams and Wife v. John Adams) was commenced in March, 1853. The complaint was in these words:

"The plaintiffs claim of the defendant twenty-five thousand dollars, due from him by account of the 5th day of July, A. D. 1851, which sum of money, with interest thereon, is now due.

"And for that whereas, heretofore, to-wit, on the 1st day of July, 1847, there was a certain matter of controversy between said defendant and one Jane Candell, relative to the will and estate of Spencer Adams, Sr., deceased, the defendant promised plaintiff Spencer Adams, that, if he would make, or cause to be made, unto him, the said defendant, a good and lawful title to all the right, title, or interest, that the said Jane Candell, daughter of the said Spencer Adams, deceased, had or has to the north-west quarter of section thirty, and the west half of the south-west quarter of section thirty, in township fifteen, range eight,—being two hundred and forty acres; and would also abandon, or cause to be abandoned, a certain suit in chancery in respect to said controversy, about to be brought against said defendant, (all of which said Spencer Adams then and there promised and undertook to do,) he, the said defendant, would give plaintiff Elizabeth Adams, who is said defendant's daughter, a full share of his property, which then and there was worth twenty-five thousand dollars; and plaintiffs aver, that said Spencer Adams did, well and truly, perform what he had so undertaken and promised, but that said defendant, on his part, has utterly failed and refused to perform his said undertaking and promise; to plaintiff's damage twenty-five thousand dollars."

The defendant pleaded, in short by consent, to the first count—

"1. That he is not indebted as therein alleged, or in any other manner, to the said plaintiff.

"2. The statute of limitations of three years, the first count being for an open account.

"3. Payment of the account or demand therein alleged."

And to the second count he pleaded, in short by consent—

"4. That he did not promise in manner and form as alleged." &c.

"5. That the said estate of the said defendant, in the second count of the complaint mentioned, consists of lands and real estate; and that defendant's promise, if any was made by him, as in the said second count alleged, was not in writing, signed

by the defendant, or by any one by him thereunto authorized.

"6. That defendant's said promise, as alleged in said second count, if any such promise was made, was not to be performed within one year from the time of the making thereof, and was not (and is not) in writing, signed by defendant, or by any one by him thereunto authorized.

"7. That said promise, if any such was made, was without consideration.

"8. That if any promise was made by defendant, as alleged in said second count, the consideration thereof was not, and has not been performed.

"9. The statute of limitations of six years.

"10. The general issue, to each count in the complaint."

The plaintiffs took issue on all these pleas, except the fifth and the sixth, to which they demurred, "because plaintiffs aver in their said count a performance of their said contract, as set out in said second count." The court overruled these demurrers, and the plaintiffs then replied to the fifth plea, "that heretofore, to-wit, on the day and year aforesaid, the said Spencer Adams, one of the plaintiffs, in pursuance of his promise, agreement, and undertaking with said defendant, as set forth in the said second count, did cause to be made to the said defendant a good and lawful title to all the right or interest that the said Jane Candell had or has to the said land described in said count, by deed duly executed by the said Jane and one Abner Candell, her husband, which said deed, plaintiffs aver, was received and accepted by said defendant, and that under said deed said defendant is now, and has been, in the quiet and peaceable possession and enjoyment of said lands; and plaintiffs aver, moreover, that said Spencer Adams did abandon the bringing of said suit in chancery, as set forth in said count, as he promised and undertook to do; and so plaintiffs aver, that said Spencer Adams hath fully done and performed all that he undertook and promised; and this they are ready to verify." To this replication the defendant demurred, "because said replication is, in substance, but a re-assertion of the allegations of the said second count, and no new issue is thereby raised; and because it is not a sufficient reply to said fifth plea." This demurrer was sustained, and the plaintiffs then took issue on the fifth plea.

On the trial, as the bill of exceptions states, "plaintiffs offered evidence tending to show that, some time in the year 1848, a conversation occurred between plaintiff and defendant, in which defendant stated to plaintiff, that if he (plaintiff) would abandon the bringing of a then contemplated chancery suit against defendant, in favor of his mother, and procure to be made to him good warranty titles to a tract of land, which had been before that time purchased by defendant, and for which he supposed his titles were not perfect, containing two hundred and forty acres; and (as some of the witnesses stated) would in future 'let him alone', or 'treat him properly', then he would make the wife of plaintiff, who was defendant's daughter, 'equal with his other children', or 'equal with his other heirs in his estate'; and that, in that case, her portion of the estate would be worth $15,000. There was no written evidence whatever of this agreement. Plaintiffs further offered proof, tending to show that he had complied on his part, by abandoning the bringing of the chancery suit, and getting a warranty deed to the land; but there was evidence, also, tending to show that plaintiff had not ceased to annoy and vex defendant. It was further in proof, that defendant's estate consisted of a large tract of land in Dallas county, and a large number of slaves, and other property.

"Under this proof, the court charged the jury, that, if defendant's estate consisted of land as well as personal property, then, under the pleadings in this case, plaintiffs could not recover in this action; to which charge plaintiffs excepted."

All the rulings of the court above set out are now assigned for error.

GEO. W. GAYLE, for the appellants:

1. The court below erred in overruling the demurrer to the fifth plea. That plea was intended as an answer to the second count of the declaration, which set out the special contract between the parties, and averred a full performance by the plaintiffs. As a plea, then, of confession and avoidance, it is not good, because, if plaintiffs performed, the statute of frauds cannot be pleaded.—Brock *v.* Cook, 3 Port. 464; Cumming's Heirs, v. Gill's Heirs, 6 Ala. 562; Rake's Adm'r, v. Pope, 7 *ib.* 161; Woodward v. Smith, *ib.* 112.

2. The same authorities show that the court erred, also, in overruling the demurrer to the sixth plea. This plea should have alleged, that the contract was not to have been performed in a year and a day.—Chitty on Contracts, p. 207.

3. There was error, also, in sustaining the demurrer to the replication to the fifth plea.—Authorities *supra*.

4. The charge of the court was erroneous; because, 1st, it is justly to be inferred from the contract that defendant's performance was to be in money, or property at a valuation, as he himself valued the interest of a child at $15,000; and, 2d, because issue was taken on the fifth plea, which alleged the whole estate to be in lands, while the proof showed that it consisted of lands and negroes: the plaintiffs' side of the issue was sustained, and they should have had a verdict.

J. H. CAMPBELL and J. W. LAPSLEY, *contra*:

The rules of pleading require that a demurrer shall be visited upon the first error that intervened in the pleadings, and therefore a demurrer to a plea goes to a defect in the declaration. The second count of the declaration in this case is fatally defective: it does not allege a valid cause of action. If it be conceded that a sufficient consideration to support a promise is alleged, still no sufficient promise is alleged. The promise alleged is, "to give Elizabeth Adams, daughter of defendant, and wife of plaintiff, a full share of his property, which was then and there worth $25,000." If this promise had been proved in the very terms in which it was alleged, how could the jury render a sensible verdict for the plaintiffs? What is meant by a "full share"? How many shares were there? When, and how, was the gift to be made? The proof, to make out a case for plaintiffs, must have gone beyond the allegations of the declaration. Though the Code dispenses with the formality of a common-law declaration, still the complaint must contain the substance of a common-law declaration—that is, it must state a complete and valid cause of action.—Erwin & Williams v. Erwin, at the last term.

But the fifth plea is good. It alleges that the promise related to lands and was not in writing. The promise, therefore, was void under the statute of frauds; and being abso-

lutely void, plaintiff's compliance could not make it binding. It is unnecessary to cite authorities to sustain this proposition.

The sixth plea, which alleges that the defendant's promise, as set out in the second count, was not to be performed within one year from the time of the making thereof, and was not in writing, is certainly good under the statute of frauds. Clay's Digest, p. 254, § 1; Code, § 1551.

The replication to the fifth plea is simply a re-assertion of the allegations of the complaint, that plaintiffs had performed their part of the agreement. If defendant's promise was void, the plaintiffs could not give it validity by any act of theirs.

The charge of the court must be construed in connection with the evidence, which would have authorized the court to instruct the jury that plaintiffs could not recover at all. The defendant's promise, as proved, was not binding on him; and even if it had been reduced to writing, and signed, no action could be maintained upon it,—the promise proved being, to make his daughter "equal with the rest of his children"; or equal with his other heirs." The promise, at all events, was void as to the lands; and a contract void in part, by the operation of the statute of frauds, is void *in toto*.—Loomis v. Newhall, 15 Pick. 159; Van Alstine v. Wimple, 5 Cowen's R. 162. An agreement to procure another to convey land, not being in writing, is void.—Gray v. Patton, 2 B. Mon. 12; Henley v. Brown, 1 Stew. 144; Chitty on Contracts, p. 268, note 1. The agreement of the plaintiffs, therefore, as well as that of defendant, is void, and leaves defendant's promise without consideration.

If there was error, the plaintiffs were not injured by it, and therefore this court will not reverse. The whole record shows, that plaintiffs are not entitled to recover.

CHILTON, C. J.—The second count in the complaint avers, that, in consideration of the conveyance to the defendant of all title which Jane Candell had to a certain tract of land, and the abandonment of a contemplated suit in chancery by the plaintiff in relation to said land, the defendant promised and agreed to give the plaintiff, Elizabeth Adams, who is said defendant's daughter, "a full share of his property, which was then and there worth twenty-five thousand dol-

lars"; that the plaintiffs did all they promised to do, and the defendant wholly failed to perform.

The defendant did not demur to this count, but filed several special pleas in answer thereto. By one of these (plea No. 5), the defendant says, that the estate of the defendant, in the second count mentioned, consisted entirely of lands and real estate, and that the promise of the defendant, if any was made, as in the second count is alleged, was not in writing, signed by the defendant, or by any other person thereunto lawfully authorized by him. To this plea the plaintiffs demurred, but the court overruled the demurrer.

The defendant, by his sixth plea to the second count, averred that the promise, if any was made, was not to be performed within a year and a day from the time of making it. To this there was also a demurrer, which the court overruled.

We think the second count of the declaration, or complaint, and both the above pleas, were bad—the count, because it sets forth an undertaking or contract, too uncertain as to the part to be performed by the defendant, to be executed by the court, or compensated for in damages. The defendant was to give to Mrs. Adams, his daughter, "a full share of his property, which then and there was worth twenty-five thousand dollars." Was the share, or the whole property, worth twenty-five thousand dollars? How was the "full share" to be ascertained? It is not averred that the defendant agreed to give her as much as he had severally given his other children; or that she should be entitled to share in his entire estate in the proportion which one child bore to the whole number of children; setting out the amounts severally given to the other children, or the number of children and value of the entire estate, so as to furnish the *data* for ascertaining the damages. The count, furnishing no means of ascertaining the full share, is as indefinite as if the defendant had agreed to pay "a sum of money", without mentioning any amount. The Code does not dispense with stating a substantial cause of action, in such manner as that, *prima facie*, the court shall be competent to give judgment for its breach. If the plaintiff sets out a special contract, which is so uncertain as to be incapable of being enforced, it is void, and his declaration or

complaint would be liable to demurrer, equally under the Code as before its adoption.

We do not desire, however, to be understood as deciding that a good count may not be framed under the contract as brought to view in the bill of exceptions. If the father, for a valuable consideration, agreed to make his daughter equal in property to his other children,—agreed to give her as much as he had given to his other children severally, or agreed to give her so much as would make her share equal to a given portion of his estate, (one-fourth, fifth, or whatever it might be,) we see no reason why such contract cannot be enforced, if, in the contemplation of the parties, they looked to the execution of it presently upon the execution of that part of the contract to be performed by the plaintiff as the consideration of the defendant's undertaking. Nor would it avail the defendant, that the contract was verbal merely; for, although his estate may be partly (or even entirely) composed of land, yet he may make the plaintiff equal with his other children by paying her a sum of money equivalent to the value of the property or money severally given to his other children. It is clearly, therefore, not a contract for the sale of land within the meaning of the statute of frauds. The rule is, that where a contract admits of two interpretations, one of which would destroy, and the other uphold, it must be so construed as that it shall avail; for the parties intended that it should have some operation.

But it is supposed that the contract would be obnoxious to another section of the statute of frauds and perjuries—to-wit, that it was not to be performed within a year and a day. To this we reply, *non constat*:—no time is given for its performance; and the law, in such cases, requires that it should be performed within a reasonable time.

In Wells v. Horton, ex'r &c., 4 Bing. R. 40, (S. C. 13 Eng. C. L. Rep. 332,) A, being indebted to plaintiff, promised him (the plaintiff) that in consideration of his forbearing to sue, A's executor should pay him ten thousand pounds; it was held, that this was not a promise required by the statute of frauds to be in writing. Best, C. J., said, the plain meaning of the statute is confined to contracts, which by agreement are not to be carried into execution within a year, and does not

extend to such as may, by circumstances, be postponed beyond that period: otherwise, there is no contract which might not fall within that period.—See Petre v. Compton, Skin. R. 353; Fenton v. Emblers, 3 Burr. 1278; Miles v. Bough, 3 Ad. & Ellis, N. S. 845; (S. C. 43 Eng. C. L. Rep. 1001–1010); Rake's Adm'r v. Pope, 7 Ala. 161.

It is argued, that the count being bad, although the pleas were bad, we should not reverse, because the court below should have visited the demurrers upon the count. Concede that the court, *mero motu*, should have done so; yet it did not do it. If the demurrer had been sustained, and visited upon the count, the plaintiff could have amended, perhaps so as to have made his pleading good; but he would be deprived of this privilege, if we refuse to reverse upon the ground that the count was demurrable. The plaintiff cannot thus be deprived of the benefit of a judgment *respondeas ouster*.—Marshall v. Betner, 17 Ala. 832.

Judgment reversed, and cause remanded.

TYUS ET AL. *vs.* DE JARNETTE ET AL.

1. The principles asserted in White v. Banks, 21 Ala. 705, as to the right of contribution among sureties, re-affirmed, and applied to this case.
2. Complainants and defendant being bound as sureties for one S., to whom defendant was indebted, S. proposed to release defendant from his liability as surety, by giving a new note with other sureties, if defendant would give him a sight draft on his commission merchant for the amount of his indebtedness, or, if he failed to procure defendant's release, that he would then place defendant's notes in the hands of a third person to protect him alone against his said suretyship; and to this arrangement complainants assented: *Held*, that this was an express waiver on the part of complainants of their right to participate in this indemnity.
3. But the facts that complainants objected to their principal making an assignment for the benefit of his sureties, because it would injure his credit, and agreed that he might procure the defendant's release from his suretyship, if the latter would pay him the amount of his individual debt; and that defendant then said, in their hearing, that if their principal failed to carry out this arrangement for his relief, he should take measures to secure himself,—are not sufficient to establish a waiver on the part of complainants of their

legal right to share in any indemnity or security which defendant might obtain.

4. Where a decree in chancery, dismissing a bill as to both of the defendants, was reversed on error, and the complainants held to be entitled to relief against one of the defendants, the costs of the appellate court were apportioned; one half being taxed against the complainants, and the other half against the unsuccessful defendant.

APPEAL from the Chancery Court of Montgomery.
Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Lewis Tyus and Henry D. Holmes against William P. De Jarnette and James T. De Jarnette; and its object was, to obtain participation for the complainants in certain securities which the defendants had procured from one Lewis Simpson, for whom complainants and defendants were co-sureties. The allegations of the bill, in substance, are as follows: That on the 29th April, 1843, complainants and defendants became sureties for Lewis Simpson, on two promissory notes, for $3818 58 each, payable to one Joshua Hightower; that judgment was recovered on said notes, against all the parties thereto, in the fall of 1847; that Lewis Simpson, at the time of the rendition of said judgment and for some time previous, was insolvent, and paid no part of said judgment; and that said judgment was paid by complainants and defendants, each paying one-fourth.

The bill further alleges, that, at the time the parties thus became sureties for said Simpson, each of the defendants was indebted to said Simpson; that Simpson informed complainants of that fact before they signed said notes, and promised them, in order to induce them to become sureties for him, that the amounts due from the defendants to him should be set apart and applied, *pro tanto*, to the payment and satisfaction of said security debt, or should stand as collateral security for its payment; that Simpson informed defendants, before they signed said notes, of this promise which he had made to complainants, and on this understanding defendants signed said notes; that on the 20th July, 1844, said James T. De Jarnette and Simpson had a settlement of their accounts, and said De Jarnette was found indebted to Simpson individually in the sum of $292 14, and to the firm of Simpson & Hightower in

the sum of $905 47, for each of which sums said De Jarnette executed his promissory note; that said James T. De Jarnette was also largely indebted to the firm of Simpson & McBride, and on a settlement of accounts with Simpson on the 2d March, 1847, was found indebted to them in the sum of $159 88, for which sum he also executed to them his promissory note; that on the 22d December, 1846, said Simpson and William P. De Jarnette had a settlement of their accounts, and said De Jarnette was then found indebted to Simpson in the sum of $1420 30, for which he executed to said Simpson his promissory note.

The bill further alleges, that in February, 1847, the defendants, by some means unknown to complainants, and without their knowledge or consent, induced said Simpson to place the notes which he held on them in the hands of E. G. Carew, W. W. Jackson, and John Golson, for the especial benefit and protection of the said defendants against their liability as sureties for him,—"saying to said Carew, Jackson and Golson, that he gave up to them all claim or title he held in these notes, and that they should deliver them to the said Wm. P. and James T. De Jarnette, to each his own note, when they arranged their proportional parts of said security debt to Hightower"; that after the defendants paid their respective proportions of the said judgment, as above stated, they called on Carew, Jackson and Golson, and received from them their said notes, which had been deposited with them by said Simpson as aforesaid, and that they have disposed of said notes and converted them to their own use. Complainants insist, that they are entitled, by reason of their being co-sureties with defendants, to share in the partial indemnity afforded by these notes; and they therefore pray for an account of the proceeds of said notes, to be apportioned equally among themselves and the defendants, and for general relief.

The defendants answered separately, but their answers are substantially the same. They admit, that they became co-sureties with complainants for said Simpson, on his notes to Hightower; that judgment was afterwards recovered on these notes against all the makers, and that this judgment was paid as charged in the bill; that Simpson was insolvent, and paid no part of said judgment; that they were indebted to Simp-

son at the time they became sureties for him, and that they afterwards had a settlement of their accounts with him, and gave him their notes for the balance found against them; that these notes were afterwards deposited by Simpson with Carew and others, for the separate indemnity of defendants against their liability as sureties for him, and that they received these notes, as charged in the bill, after they had paid their respective portions of said judgment. They deny that Simpson ever promised complainants, as alleged in the bill, that the amount of their indebtedness to him should be applied towards the payment of said security debt, or should stand as collateral security for its payment; and allege, that if any such promise was made by Simpson, they never had any knowledge or notice of it, until long after their notes, which Simpson had deposited with Carew and others, had been delivered up to them. They allege, that Simpson, at the time he requested them to become sureties for him on his notes to Hightower, promised them that he would not call on them to pay the amount of their indebtedness to him until the last one of his notes to said Hightower fell due, and that their indebtedness to him should stand as a separate indemnity for them against liability on the notes to Hightower.

They allege, also, that some time after they had become sureties for said Simpson, they became uneasy about their liability on his account, and an interview on the subject was had between complainants, Simpson, and James T. De Jarnette, (the latter acting for himself and his co-defendant,) at Simpson's store; that Simpson told them at this interview that he was fully able to pay said notes to Hightower, and that there was no danger to be apprehended by them; that complainants, upon this information being given, objected to Simpson's making an assignment to secure them, because it would injure his credit, and said that they were not uneasy; that James T. De Jarnette stated that he was uneasy about his liability, and insisted that Simpson should either secure him and his co-defendant, or should release them from their liability on the notes; that Simpson then proposed to release defendants from their liability on his notes, by giving new notes with other sureties in their stead, if they would give him a sight draft on their commission merchant in Mobile for the amount

of their indebtedness to him, and that, if he failed to procure their release, he would then deliver up to them, for their separate indemnity and protection, the notes which he held on them; that complainants assented to this arrangement, and that James T. De Jarnette accepted it on behalf of his co-defendant and himself; that Simpson failed to procure defendants' release from liability on the notes within the specified time, and afterwards deposited the notes which he held on them with Carew and others, in pursuance of said agreement, for their separate protection against liability on his notes. They insist that they had a perfect right thus to secure themselves, and that complainants have no claim on them for contribution.

Simpson, who was examined as a witness by both parties, testified, "that he did not promise complainants that the notes of said defendants should stand as collateral security for all the sureties on the notes to Hightower, but recollects that he told complainants, in a conversation had with each one separately, that defendants would owe him about $5,000, and that Holmes would owe him upwards of $400, and that they were all to be indulged until the last note fell due of the Hightower debt; that this conversation was had before the notes were signed, and that the defendants did not know of said conversation." He gives the following account of the interview between the parties at his store: "That complainants and defendant James T. De Jarnette met at his store in Vernon to make some arrangement to have themselves indemnified on account of their liability on said notes to Hightower; that he does not recollect having made any definite statement to them of the condition of his affairs; that he made a proposition to them, that if said defendants would pay their liabilities to him, he would release them from the notes to Hightower, and would get other names instead of theirs to go on said notes with complainants, and thus reduce the liability of each of the complainants on said notes to about $800; that he was to have four or five weeks to effect this arrangement; that all parties assented to this proposition, and complainants expressed themselves better satisfied with this arrangement than they would be with an assignment; that said James T. De Jarnette then said, in the presence of complainants, that if

this arrangement could not be carried into effect, then he would take measures to have himself secured; that he expressed himself uneasy about his own and his brother's liability on the notes to Hightower, to which complainant Holmes replied, that he did not feel uneasy."

James T. De Jarnette was examined as a witness for his co-defendant, and testified to the same facts, in relation to what occurred at the interview between the parties at Simpson's store, which he had stated in his answer.

Carew was also examined as a witness by the defendants, and proved the conditions on which he received their notes from Simpson, and subsequently delivered them on the performance of those conditions.

On final hearing, on bill, answers, and proofs, the chancellor dismissed the bill; and his decree is now assigned for error.

T. WILLIAMS, for the appellants:

1. It is not necessary to make the principal debtor a party, when he is insolvent; nor to make an insolvent co-surety a party.—Couch v. Terry's Adm'rs, 12 Ala. 225.

5. A surety, who pays the debt of his principal, is not entitled to contribution from his co-surety, when he owes the principal debtor more than he paid as surety.—Fitzpatrick v. Hill, 9 Ala. 783; Bezzell v. White, 13 *ib.* 422.

3. But a surety is entitled to the benefit of all securities, or liens, taken by the principal creditor.—Brown v. Lang, 4 *ib.* 50.

4. So, also, a surety is entitled to share with his co-surety in all securities and liens which he may obtain from the principal debtor.—Fagan v. Jacock, 4 Dev. 263. The case of Moore v. Moore, 4 Hawks 358, is on the express ground, that the co-sureties had not engaged in the same common risk.—Gregory v. Murrell, 2 Ired. Eq. 233; Kerns v. Chambers, 3 *ib.* 576; Hall v. Robinson, 8 Ired. L. 56; Bachelder v. Fish, 17 Mass. 464; Low v. Smart, 5 N. H. 353.

5. A principal and a co-surety cannot make any contract or agreement for the benefit of one co-surety, to the prejudice of another.—Hall v. Robinson, 8 Ired. L. 60. And therefore, where one co-surety, after having paid his share of the principal debt, sues the principal in his own name, and recovers,

his co-surety is entitled to contribution in the amount obtained on that recovery.—Doolittle v. Dwight, 2 Metc. 561.

6. The debts due from the De Jarnettes to the principal debtor were due and owing at the time the parties met, in order to get security from Simpson, to-wit, in February, 1846; and as such the complainants had an existing equity in having those debts applied to the general discharge of the sureties. No agreement by them to surrender this right or equity to the De Jarnettes, without consideration, was binding; and it is not pretended that any consideration passed between the parties.

7. There never could have been the agreement pretended by the defendants; for the time when the agreement is said to have been made was prior to the date of the note, in December, 1846.

8. But there is no such proof as to James T. De Jarnette, and no equity passed to him by an assent for Wm. P. De Jarnette's benefit, if any such assent was given.

9. If defendants had paid the whole debt, and filed their bill for contribution, Holmes and Tyus would only be required to contribute a portion of the excess above the amount of their indebtedness to Simpson.—Bezzell v. White, 13 Ala. 422.

10. There is no evidence that Simpson had the power to secure by making an assignment; no proof of what he had to assign.

N. HARRIS, *contra*:

1. The agreement under which the notes of the appellees were placed in the hands of Carew and others was not a transfer of the notes as collateral security: it was an agreement on the part of Simpson, the principal debtor, to repay to the appellees the amount they might pay for him in a particular manner. It is clear that a debtor has the right to prefer one creditor to another. The appellants and appellees, the very moment they paid their respective proportions of the debt for which they were bound for Simpson, became creditors to the extent of their respective payments, and Simpson had the right to repay any one of them the amount of his payment; and if such repayment was made for the exclusive benefit of the surety to whom it was made, the other co-sureties had no

claim whatever upon him for contribution. If Simpson had retained in his possession the notes of the appellees until they had paid the amount for which they were bound as his sureties, and then delivered to each one his note in repayment of the sum so paid by him, it is clear that the appellants would have had no right whatever to call on the appellees for any part of this amount; and this being so, does the fact that Simpson parted with the possession of the notes before the money was actually paid by the appellees, and directed the persons to whom they were delivered to deliver them to the appellees respectively when they should have paid their proportions of the security debt, change the principle, and give the appellants a claim in equity against the appellees which they would not have had if Simpson had retained the notes until the debt was actually paid? No reason is perceived why the principle should be different in the two cases. If the appellees had paid Simpson the amount of their indebtedness to him, and he had retained the money until after they had paid their respective proportions of the debt for which they were bound as his sureties, and then paid it back to them in repayment of the amount which they had paid for him, the appellants certainly could not have called on them for contribution. How, then, can it be insisted, that because the appellees gave Simpson their notes for the amount of their indebtedness to him, and he placed these notes in the hands of others, to be delivered back to them when they paid their respective portions of the security debt,—that therefore the appellants are entitled to contribution in these notes?

2. The right of contribution among sureties does not depend on any implied contract, but is the result of an acknowledged principle of natural justice, which requires that those who voluntarily assume a common burden should bear it in equal proportions.—White v. Banks, 21 Ala. 705. Whenever, therefore, in any case, a fact or circumstance exists, which would render it inequitable or unjust for one surety to call on another for contribution, the right to contribution does not exist; and whenever the right of contribution does not exist, the person deprived of it can have no claim upon any collateral security which a co-surety may have obtained for his own indemnity. The cases of White v. Banks, *supra*,

Thompson v. Adams, 1 Freeman's Ch. R. 228, and Moore v. Moore, 4 Hawks 353, show in what cases a surety has no right to participate in a collateral security received by his co-surety. Even supposing that the appellees' notes were placed in Carew's hands as collateral security only, the appellants, by their conduct, have lost all right to participation in that fund. In fact, they may be justly considered as having assented to the notes being placed in Carew's hands for the appellees' sole benefit. It would be inequitable and unjust, after the appellants had prevented the principal debtor from making an assignment which would have protected all his sureties, to allow them now to come in and participate in a fund which the appellees have secured for themselves by their own exertions.

3. The agreement between Simpson and the appellees, made at the time they became his sureties, which is set up in the answers, and fully established by the testimony of Simpson, shows that the appellees' indebtedness to him should be a fund for their indemnity against liability for him, and comes within the principle of Moore v. Moore, *supra*. Any one, on becoming surety for another, may stipulate for a separate indemnity; or, after becoming bound, sureties may renounce all benefit in a security received by a co-surety.—Long v. Barnett, 3 Ired. Eq. 631. The case of Doolittle v. Dwight, 2 Metcalf, cited by appellants' counsel, does not decide the principle contended for: the recovery in that case was upon a joint cause of action for both sureties.—p. 569.

GOLDTHWAITE, J.—In White v. Banks, 21 Ala. 705, we held, that the right of contribution among sureties was not founded on contract, but was the result of a general equity on the ground of equality of burden and benefit; and this equity, as it is based alone on the duties of the parties arising from the peculiar situation they occupy to each other, is not affected by any agreement or arrangement made by one with the principal for his individual benefit, during the existence of that relation. Hence, the mere fact that indemnity was obtained by one surety, upon an understanding with the principal creditor that it should be used solely for his protection, would not prevent his companions from sharing in it on equi-

table terms. We held, however, in the same case, that as this rule was founded on principles of natural justice, courts would not enforce it when the circumstances of the case rendered its application inequitable.

Applying this doctrine to the present case, the only question is, whether such a state of facts is made out by the evidence, as should take it out of the general rule, and bring it within the exception. The answers deny that the debts which were received by the appellees as separate indemnity, were to be held as collateral security for the principal debt; and the evidence of the witness Simpson shows, we think, very clearly, that there was no such agreement. James T. De Jarnette, who was examined as a witness on the part of the appellee Wm. P. De Jarnette, states that, after the parties had become sureties, the principal debtor told him, that he had promised Wm. P. De Jarnette that the amount owing by him (about fourteen hundred dollars) should be held as collateral security until the principal debt was due; and if William P. De Jarnette had anything to pay, it would not exceed that amount. Conceding for argument's sake the competency of this testimony, it certainly does not tend to establish any agreement, or understanding, that the other sureties were to look to this debt, as indemnity for themselves. If anything, it tends to prove that, if Wm. P. De Jarnette paid, as surety, the amount of his indebtedness to Simpson, he could, as that debt was to be indulged until the principal debt fell due, look to it to reimburse himself. There is no evidence tending to establish the charge that the debts owing by the appellees were agreed to be held as security for the benefit of all; and as the testimony clearly establishes they were received by the appellees as the separate indemnity of each, the only question, as we have said, is, whether under the circumstances the appellants are entitled to share in them. As to Wm. P. De Jarnette, it is shown clearly, that the appellants consented, that if Simpson failed to make the arrangement proposed by him, and assented to by all the parties, then he might receive his own notes for his separate indemnity. This was an express waiver, on the part of his co-sureties, of their right to participate in such indemnity, and we must hold them bound by it. If it were otherwise, a party might be

lulled into a false sense of safety by the act of his companions, and thus be prevented from effectually protecting himself by obtaining additional security. There are many cases in which an equity can be waived or discharged by parol (Walker v. Walker, 2 Atk. 93; Lake v. Lake, Amb. 126; Roe v. Popham, Doug. 24; Price v. Dyer, 17 Ves. 356); and the same principles of natural justice, which create the equity of contribution between co-sureties, would discharge it, when the parties themselves expressly consented to waive it.

As to the other party, James T. De Jarnette, there is more difficulty. The just application of the principles we have just asserted, requires, that the waiver of a surety to his right of contribution should be fully and clearly established by the evidence; and our first impression was, that the testimony was sufficient on this point as to both of the appellees; but more mature consideration has satisfied us, that our conclusion in this respect was wrong, and that as to James T. De Jarnette the facts established by Simpson, who is the only witness so far as he is concerned, do not prove a waiver of their equity on the part of the appellants. That the appellants were opposed to Simpson's making an assignment for the protection of all the parties, for the reason that it would injure his credit, is entitled to no weight upon the question we are now discussing. It tends to show that they were not so much alarmed as to their situation as the other party, and not so eager to obtain indemnity; but it cannot be fairly regarded as any evidence of an intention on their part to relinquish rights to which they were by law entitled,—the more especially as another proposition was made, to which they all consented, and which left the relative equities of all precisely as they were. Independently of this evidence, the only fact we can look to, as even tending to establish the waiver, is, that the appellants made no objection, when James T. De Jarnette said, in their hearing, that if Simpson failed to carry out the arrangement which was to relieve him, he should take measures to secure himself, and that when he expressed his uneasiness as to his situation, Holmes replied, that he did not feel uneasy. This is not enough to satisfy us clearly, that the appellants intended to waive any of their legal rights. There is no proposition of this kind made. What was said amounts

to nothing more than a mere declaration of intention on the part of one surety, in a certain event, to secure himself, made, apparently, without reference to the assent or dissent of his companions, and not naturally calling for an answer from them. Indeed it does not even appear that the remark was addressed to them.

It is most probable, we agree, that by this declaration he intended to express his intention of obtaining separate indemnity, and the other parties may have so understood him; but we cannot say this, speaking from the testimony alone, with any degree of certainty. They may have supposed that he intended to secure himself by obtaining full indemnity for the debt. The rule in relation to admissions, to be inferred from acquiescence in the verbal statements of others, should be applied with great caution; "and it must plainly appear that the language was fully understood by the party, before any inference can be drawn from his passiveness or silence, and must be such as would properly and naturally call from him some reply."—Greenl. Ev. §§ 197, 199. We have found no case which has gone so far as to interpret mere silence, or such an answer as was given by Holmes, in a case like the present, into a consent to give up a right, and should regard it as unsafe and dangerous to establish such a precedent. Our conclusion is, that the evidence fails to establish any discharge of the equity of the complainants below as to the indemnity received by James T. De Jarnette, and in that they must be allowed to participate.

The decree must be reversed, and the cause remanded. But as to the costs in this court, as the decree has been impeached as to Wm. P. De Jarnette, we think it right that the appellants, as they have failed in the ground taken in respect to him, should pay half the costs; the other half must be taxed against James T. De Jarnette.

BLEVINS, ADM'R, &c., *vs.* BUCK ET AL.

1. The act of 1846, "to protect the rights of married women," (Pamphlet Acts 1845-6, p. 23,) does not, of itself, and without any act on the part of the wife, destroy her right to a settlement out of her choses in action and equitable interests as it existed before the adoption of that act; but the intention of the act was, to tender to her what was supposed to be a more valuable right, and to leave it to her election to claim the benefit of the act, or to assert her equity to a settlement without regard to its provisions.
2. After the rendition of a final decree, on a bill filed under this act, vesting the property in a trustee for the sole and separate use, support and maintenance of the wife and her family, the wife may, during coverture, create a charge upon the property, which may be enforced by a bill filed after her death, and by a sale of the entire property, if necessary, under a decree of the court.
3. The wife's children are not necessary parties to a bill, filed after her death, to subject personal property settled under the provisions of this act to the payment of a charge upon it created by her during coverture.
4. When a note under seal is executed by husband and wife, and is transferred for valuable consideration by delivery merely, the transferror and transferree may join in a bill to enforce its payment out of the wife's separate estate upon which it is a charge.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed in April, 1852, by Daniel Buck and S. D. Hale against the appellant, as the administrator of Mrs. Margaret O. Blevins, deceased. It alleges that in March, 1846, Mrs. Blevins, who was then the wife of John Blevins, filed her bill in the Chancery Court at Huntsville against her husband and the administrators of John Connally, deceased, who was her father; that said bill was filed under the provisions of the act of February 4, 1846, entitled "an act to protect the rights of married women," and its object was, to have settled upon said complainant, for her sole and separate use and benefit, her distributive share of her father's estate, which was then in the hands of his administrators, his estate not having been settled; that a decree was afterwards rendered in said suit in favor of complainant, "the legal effect of which decree was, as complainants are advised, to settle

the distributive share of said Margaret O. Blevins in her father's estate to her sole and separate use, and as her sole and separate estate"; that under and by virtue of said decree Mrs. Blevins received a number of slaves, and other property of great value; that after she had come into the possession of this property, she and her said husband executed their promissory note, under seal, for $1345, to complainant Buck, who afterwards sold and transferred the same to his co-complainant Hale; that the principal ground upon which said bill was filed by Mrs. Blevins, and said decree thereon rendered by the chancellor, was the insolvency of said John Blevins; that he continued insolvent from that time until his death, which occurred in the spring of the year 1851, and was insolvent at the time he signed said note with his wife; "that the legal effect of said writing obligatory was, to bind the said separate estate of the said Margaret O. Blevins for its payment, and complainants aver that said separate estate was and is liable for its payment. The bill further alleges, that Mrs. Blevins died in September, 1849, intestate, leaving several children, and that the defendant has been duly appointed administrator of her estate.

A transcript of the proceedings had in said suit in the Chancery Court at Huntsville, on the bill filed by Mrs. Blevins, is made an exhibit to the bill. The decree in that suit is in the following words: "It is ordered, adjudged, and decreed, that the share of Margaret O. Blevins in the estate of her father, John Connally, deceased, be, and the same is hereby vested in Rodah Horton, as trustee, for her sole and separate use and support, and the support and maintenance of her family; and that the administrators of said estate now acting, and all others who may be hereafter appointed, be enjoined and restrained from paying over such portion, or any part thereof, when ascertained, to any other person whatsoever."

The trustee named in the decree having died, James W. McClung was afterwards appointed trustee in his stead by a decree of said Chancery Court at Huntsville; and he also having departed this life before the filing of this bill, his executors were made defendants, and decrees *pro confesso* were taken against them.

The administrator of Mrs. Blevins answered the bill, admitting all its material allegations, but denying that said promissory note created any charge on her separate estate; and he demurred to the bill for want of equity.

The chancellor decreed in favor of the complainants, and overruled the demurrer to the bill; and his decree is now assigned for error.

WM. M. MURPHY and THOS. J. JUDGE, for appellant:

1. As to the question of jurisdiction: The bill states that Mrs. Blevins, in her lifetime, held the property now in the defendant's hands as her sole and separate estate; that she is dead, and that defendant is her administrator; and that her husband and the trustee are both dead. Upon these facts, the defendant should have been sued at common law, and equity has no jurisdiction.—Vance v. Wells & Co., 8 Ala. 399; Lee v. Muggeridge, 5 Taunt. 37.

2. Buck should not have been made a party complainant. If Hale is a *bona fide* assignee, and the assignment was absolute, as stated in the bill, both of them are not entitled to a decree.—Wilkins v. Judge, 14 Ala. 135; Hardeman v. Sims, 3 *ib.* 747; Story's Eq. Pl. § 392; Clarkson v. DePeyster, 3 Paige 336; 2 Sim. R. 237; Trecothick v. Austin, 4 Mason's R. 16; Field v. Maghee, 5 *ib.* 539; Sadler v. Houston, 4 Port. 208.

3. The separate property, secured to Mrs. Blevins by the decree of the Chancery Court at Huntsville, was for the support and maintenance of her children and family as well as herself, and therefore was not subject to her separate contracts. The interest of the mother and her children, being collective, cannot be divested.—Inge v. Forrester, 6 Ala. 418; Fellows, Wadsworth & Co. v. Tann, 9 *ib.* 999. Mrs. Blevins could not charge this property with liabilities contracted by her as the surety of her husband. She held the property for a particular purpose—not only for her own support, but equally "for the support and maintenance of her family." This is the language of the statute, and also of the decree. The trustee holds for distinct purposes, equally imposing. The words "sole and separate use" are used in the statute to exclude the husband's marital rights; but there is a common

usufructuary interest for her and her family. The principle on which the wife charges her separate estate, is, that she has the same control over it that she would have if she were sole—that is, an absolute control. But under this statute, as the chancellor admits in his decree, she has not the right of absolute disposition.—Spear v. Walkley, 10 Ala. 328; Rugely v. Robinson, *ib.* 702.

4. The act of 1846 settles the property upon the wife and children in precisely the same manner that a decree in chancery would have settled it upon them, if a bill had been filed for that purpose; and the act provides, in case of intestacy, that the property shall descend in precisely the same manner in which it would have descended if it had been settled upon them by a decree in equity—that is, the separate and several interest of each to the next of kin of each. The act, then, being cumulative merely, the children have the same interest vested in them by it that would have vested by bill. That interest is a vested right, unless the wife expressly dissents from their taking anything; and here, the wife, taking under the act, has not dissented. The children, therefore, have a vested right, which cannot be appropriated to their mother's debts: her interest only can be thus subjected, by a proper proceeding for that purpose; and when their interest is to be ascertained and severed, or affected in any way, they must be parties to the proceeding.—2 Story's Eq. § 1417, and authorities cited in note 1, p. 280; Murray v. Elibank, 13 Ves. 1; Munford v. Murray, 1 Paige 620; 1 White & Tudor's Lead. Cas. in Eq., p. 387, and authorities cited.

5. The statute was affirmative and cumulative, and did not change or propose to change the previous laws, except to provide a cheaper and more expeditious remedy for the wife and children; and it certainly ought not to be held to restrict their privileges, or the existing kindness of equity to them.—Smith's Com. on Statutes, pp. 771-2.

6. Statutes enacted at the same session of the Legislature, and on the same subject, ought to be taken *in pari materia*, and should receive a construction, if possible, which will give effect to each.—Smith's Com. 755. The act "to protect the rights of married women" was approved the 4th of February, 1846, and the act "for the relief of married women" was

passed on the 31st of January, 1846; and this latter act gives a child the right to file a bill.—Pamph. Acts 1845-6, pp. 24-5.

7. Mrs. Blevins had no power, during her lifetime, to sell or mortgage the property: the only power of disposition she had over it was to dispose of it by will. When a statute gives a new power, and at the same time provides the means of executing it, those who claim the power can exercise it in no other way.—Smith's Com. 777. That she could not have conveyed by deed, see 1 Story's Eq. § 97; Montgomery v. Agricultural Bank, 10 Sm. & Mar. 575; 9 *ib.* 435.

WM. M. BYRD, *contra:*

The decree of the chancellor is correct, and the opinion written by him is clear and conclusive upon the merits of this cause.

1. The first and main point taken by the appellant is, that our remedy is ample and complete at law. We reply, that the bond of a *feme covert* is void at law, and can only be enforced in equity, on the ground that she had a separate estate at the time of the execution of the bond, which in equity is chargeable with the payment of the same.—Forrest v. Robinson, 4 Port. 44; *ib.* 208; 2 Bright on H. & W. 249 to 254; Vance v. Wells, 8 Ala. 399.

2. The chancellor properly held, that the property acquired and settled on appellant's intestate, by the decree of the Chancery Court of Madison county in 1846, was such an estate vested in her as would be liable in equity to the payment of her bond contracts. The act of 1846, relied on by the appellant to defeat this cause, merely enlarges the jurisdiction of the Court of Chancery, and it does not, nor does the decree of the Chancery Court of 1846, vest any title to the *corpus* of the property in the "family" or children of Mrs. Blevins.—Pamph. Acts of 1845-6, p. 23; 2 Bright on H. & W. 220 to 241; *ib.* 249 to 254; Story's Eq. § 1390 to 1394, 1401; Forrest v. Robinson, 4 Por. 44; Sadler v. Houston, *ib.* 208; Vance v. Wells & Co., 8 Ala. 399; McCroan v. Pope, 17 *ib.* 612; Lee v. Muggeridge, 5 Taunt. 37.

3. If the second point is sustained, then it follows that the children of Mrs. Blevins are not necessary parties to the bill. If the children had any vested interest in the property, it was

only the right to the profits for maintenance and support during the life of the mother; for, at her death, she had the right to dispose of it by will. But, if she had any separate interest in the property from her husband, she became liable in equity to pay said bond.—17 Ala. 612.

4. Hale and Buck were proper parties complainant. The assignor of a bond, though not a necessary party, may be made a party to the bill, either complainant or defendant.—Story's Eq. Pl. § 153-4; Daniel's Ch. Pr. 243 to 251; Field v. Maghee, 5 Paige 539; 6 *ib.* 598.

RICE, J.—The equity of the wife to a settlement out of her choses in action and equitable interests, was a right well known in this State, at and before the passage of the act of February 4th, 1846, entitled "an act to protect the rights of married women."

By the first section of that act it is provided, "that in all cases where a married woman may be entitled to a legacy, or to a distributive share of the estate of a deceased person, or to any other chose in action, not reduced to possession, she may, by filing a bill in chancery, have such legacy, distributive share, or choses in action, vested in a trustee for her sole and separate use and support, and for the support and maintenance of her family, if it shall be made to appear to the chancellor that the same would probably be lost to her, if permitted to go into the hands of her husband, either from his insolvency, intemperance, or improvidence; and in like manner, if she has an interest in lands belonging to the estate of a deceased person, either by descent or devise, the same may be secured for the foregoing purposes, by filing a bill pursuant to the provisions of this act, at any time before a division of such lands shall have been made."

By the second section, the proceedings under the act are prescribed.

By the only other section it is provided, "that such married woman shall have a right to dispose of any such property, real or personal, by will; and in case of her death, without having made such disposition, the same shall be divided and distributed as in other cases of intestacy."

The equity of the wife, as it existed at and before the pass-

age of the act above cited, did not authorize the court to require the husband to settle the whole of her choses in action and equitable interests upon her and her children, but a reasonable proportion of them only.—1 Bright on Husband and Wife, p. 240.

Her children had no equity, in their own right, which could be asserted against her wishes, or in opposition to her rights. She had the right to waive her equity, even after the institution of her suit, at any time before an order or a decree; and if she did waive it, her children's right was thereby defeated, for their right was at her disposal until an order or a decree. 1 Bright on H. & W., pp. 242 to 244; 2 Story's Eq. Jurisp., §§ 1402 to 1419.

It is obvious that the act of 1846 conferred upon the wife the right, in all cases embraced by its provisions, to exclude her husband from, and secure to herself for the purposes therein mentioned, all her choses in action, legacies, distributive shares, and equitable interests, real and personal, not reduced to possession. This right was generally, if not universally, more valuable to her than her equity to a settlement. But it is evidently inconsistent with that equity; for she could not take *the whole* under the act of 1846, without thereby destroying her equity to a settlement out of it.

Our opinion is, that the intention of the act was not, by mere force of its provisions, without any act on the part of the wife, to destroy her equity to a settlement as it then existed; but the intention was, to tender to her by its provisions what was supposed to be a more valuable right, and to leave it to *her election* to assert her equity to a settlement without regard to the act, or to avail herself of the right tendered by the act.

This construction comports with the title of the act itself, and is in accordance with the spirit of our legislation in relation to married women.

Her election, when made and consummated by a final decree, would not only conclude her, but her children also; for their right was dependent upon her and her acts, as above shown.

In the present case, the wife made her election to take the benefit of the act of 1846, and accordingly obtained the property under its provisions. Hence, it is clear, that the pro-

visions of that act became the law of that property, both as to herself and her children.

Under the provisions of that act, and her bill filed in pursuance thereof, the decree of the chancellor vested the property in a trustee, *for her sole and separate use and support, and for the support and maintenance* of her family; and the act gave *her* the right to dispose of the property by will, and provides, that "in case of her death, without having made such disposition, the same shall be divided and distributed as in other cases of intestacy."

Whether, *during the life* of the wife, the *property* could have been sold to satisfy a charge created upon it by her, after the decree had vested it in the trustee as aforesaid, we do not decide, because it is unnecessary to decide that question. But we have no hesitation in holding, that after said decree had been made, she could, during her coverture, create a charge upon said property, and that such charge can be enforced by a bill filed *after her death*, and by a sale of the entire property, if necessary to pay off such charge, under a decree made under such bill.

This conclusion seems to us to be inevitable from the phraseology of the act of 1846, and the observance of the following established principles, to-wit: 1st, that where property has been settled upon a married woman to her separate use, she is to be deemed in a court of equity as having all the power of a *feme sole* over it, except to the extent that her power may have been restrained, expressly or by clear implication, by the instrument creating such separate estate, or by statute; 2d, that she may charge such separate estate for the payment of her husband's debts, by an agreement freely and fairly entered into, unless restrained as aforesaid.—Bradford v. Greenway, 17 Ala. 797; McCroan v. Pope, *ib.* 612; Collins v. Rudolph, 19 *ib.* 616; Collins v. Lavenberg, *ib.* 682; Ozley v. Ikelheimer, at the present term; 2 Story's Equity Jurisp. § 1398.

Conceding that, when property is settled upon a trustee for the sole and separate use and support of a married woman, and for the support and maintenance of her family, under the provisions of the act of 1846, she and her family were to have *the use* of the property as a joint fund *until her death*, yet it is

clear, that by force of the provisions of the third section of the act, this right of her family ceases at her death; and after her death, no member of her family can take any interest in the property, except as her legatees, devisees, or distributees. And as, after her death, they can only take as her legatees, devisees, or distributees, they are estopped from saying that it is not her property.

To a bill filed after her death, to subject personal property settled under the aforesaid act to a charge upon it, created by her during her coverture, her children are not necessary parties. The administrator of an intestate, in such a case, represents the distributees as to the personalty.

When a note, under seal, is executed by husband and wife, and is transferred for valuable consideration by the obligee to another, without any writing, and by delivery merely, the transferror and transferree may join as complainants in a bill to enforce its payment out of the separate estate of the wife, upon which it is a charge.—McLane v. Riddle, 19 Ala. 180.

There is no error in the proceedings of the Chancery Court in this cause, of which the appellant can complain, and its decree is affirmed.

STALLINGS *vs.* NEWMAN.

1. In slander for words spoken charging plaintiff with the crime of having murdered defendant's son, it is not necessary to aver the death of the person said to have been murdered.
2. If a demurrer is improperly sustained to a declaration, and the plaintiff then amends, he thereby waives his right to review on error the decision of the court in sustaining the demurrer.
3. What are privileged communications which will not sustain an action for slander.
4. A witness may testify that he received and understood the defendant's communication as private and confidential, in the absence of any injunction of secrecy from the defendant, or of any declaration on his part that they should be so regarded; but whether the communication was so intended by the defendant, or, if so intended, was nevertheless prompted by malice, is a question for the determination of the jury.

5. The court having instructed the jury, "that confidential communications, made in the usual course of business, or of domestic or friendly intercourse, should be liberally viewed by juries"; *held*, that the charge was not erroneous.

6. The words declared on as slanderous, charging plaintiff with having murdered defendant's son, being shown to have been spoken while defendant and witness were alone together, going to a neighbor's house to get him to read a letter which defendant had received relative to his son's death, *held*, that defendant's declaration to witness, made in the same conversation, "that his wife was much distressed on account of her son's death", was admissible evidence for him, as tending to show that the words spoken were prompted by grief rather than malice.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. THOMAS A. WALKER.

THIS was an action of SLANDER for words spoken, brought by John Stallings against John Newman; the words charged in the first count, which are alleged to have been spoken to one William Stallings, the brother of plaintiff, are as follows: "Your clan (meaning the clan of plaintiff's said brother, and thereby meaning plaintiff) has murdered my (meaning defendant's) son"; "John Stallings, your brother, (meaning plaintiff) murdered my (meaning defendant's) son"; "Your brother (meaning the brother of said William Stallings, and thereby meaning plaintiff) has murdered my son," (meaning defendant's son, one Cornelius Newman.) In the second count the words charged were, "I (meaning defendant) am satisfied that he (meaning plaintiff) murdered him, (meaning defendant's son, one Cornelius Newman,) or took him (meaning defendant's said son) to where he (meaning plaintiff) knew it would be done;" thereby meaning and intending to charge plaintiff with having murdered defendant's said son, or with having been accessory to his murder.

The defendant demurred to each count in the declaration, and his demurrer was sustained; and thereupon plaintiff, having obtained leave to amend his declaration upon paying the costs of the term, amended each count by adding an averment that said Cornelius Newman, before the speaking of the words charged, "had died, or had been killed in said State." To the declaration as amended the defendant pleaded not guilty, and issue was joined on that plea.

"On the trial," as the bill of exceptions states, "the plaintiff offered proof tending to show that, in May preceding the commencement of this suit, one William Stallings, who was plaintiff's brother, and James Newman, who was defendant's son, had some angry words, and were about closing to fight, when they were separated by persons present; that defendant then came up, a good deal excited, and said to said William Stallings, 'Your brother murdered my son, Cornelius Newman'; and proved that plaintiff was the only brother of said William Stallings at that time. Plaintiff also proved by one Clayton, that at another time defendant said to him, that he (defendant) did not believe that plaintiff had murdered his son with his own hands, but that he had taken him where he knew it would be done. On cross-examination, this witness stated that, when this was said, witness and defendant were alone with each other, and no other person was present; that they were very friendly, and had been so for a number of years; also, a number of other things stated to him by defendant in said conversation brought out by the plaintiff; and said, also, that at the time of said conversation, he and defendant were going from defendant's house to the house of a neighbor, to get that neighbor to read a letter which defendant said he had received relating to the death of his son, neither witness nor defendant being able to read; and that they did go and get said neighbor to read said letter. Plaintiff then closed.

"Defendant, after having introduced the testimony of other witnesses, called said Clayton back to the stand, and by leave of the court was permitted to cross-examine him as to facts omitted; and asked him, whether said conversation between him and defendant was not private and confidential. Plaintiff then asked the witness, whether defendant so stated such conversation to be at the time it was had; and witness said, he did not remember that defendant did. Plaintiff then objected to the question; but the court overruled the objection, and permitted the question to be asked, and plaintiff excepted. The witness then answered, 'I so received it and understood it.' Plaintiff then asked the court to exclude this answer; but the court refused to do so, and plaintiff excepted. Plaintiff then renewed his objection to both question and answer,

and asked that each should be excluded, and also that both should be excluded; but the court overruled each objection, and permitted both to go to the jury, and the plaintiff excepted.

"Defendant asked said witness, also, if defendant was not much distressed at the time on account of the loss of his son, and whether defendant did not tell him, in the same conversation, that his (defendant's) wife was much distressed on the same account. Plaintiff objected to what defendant said about his wife, as being irrelevant, but the court overruled the objection; witness answered, that defendant did tell him so, and plaintiff excepted.

"Upon this state of facts, the court charged the jury, in writing—

"1. This is an action brought by the plaintiff to recover damages of the defendant for words spoken of and concerning the plaintiff. Slander may be defined to be, the false, wilful, and malicious speaking or publishing of another any defamatory words, charging him with being guilty of a felony or crime.

"2. In this action, to authorize the plaintiff to recover, it is necessary for him to prove that the defendant, maliciously and falsely, spoke, of and concerning the plaintiff, the words charged in his declaration, or some of them; and when plaintiff proves, to the satisfaction of the jury, that defendant, falsely and maliciously, spoke or uttered, of and concerning plaintiff, the words charged in the declaration, then he may recover such damages as he has sustained.

"3. To charge one of murder by killing another is actionable and slanderous, and, if falsely and maliciously spoken, warrants a recovery of such damages as the jury may think the party has sustained, commensurate with the injury sustained.

"4. The charge must be falsely made; but the falsity of the accusation is to be implied until the contrary is shown.

"5. Malice is essential to the support of an action for slanderous words; but if one, falsely, wrongfully, and wilfully charges another with a felony, the law will imply malice until the contrary is shown. On the part of the defendant it is insisted, that the words spoken by him were spoken under such circumstances as to rebut and repel all malice.

"6. Whether this be the case or not, the jury must determine from all the proof.

"7. For the purpose of rebutting and repelling the idea of malice, the defendant has the right to prove and explain all the facts and circumstances surrounding the speaking of the words; also, he has the right to show and explain all the facts and circumstances surrounding the speaking of the words in mitigation of damages.

"8. Confidential communications, made in the usual course of business, or of domestic or friendly intercourse, should be liberally viewed by juries: they should look whether the words were spoken with intent to defame, or in good faith to communicate facts interesting to one of the parties."

To the last charge the plaintiff excepted; and he now assigns it for error, together with the other rulings of the court above stated, in sustaining the demurrer to the declaration, and in the admission of the evidence objected to.

Jas. B. Martin and D. W. Baine, for appellant:

1. The demurrer to the declaration was improperly sustained. The words used convey a direct charge of murder, and are of themselves actionable; and no colloquium was necessary, stating the death of the person charged to have been murdered. If he was still alive, or had come to his death in any other way than by the hand of a murderer, it was matter of defence to be shown by the defendant.—Hall v. Montgomery, 8 Ala. 510; Lea and Wife v. Robertson, 1 Stew. 138; Holly v. Burgess, 9 Ala. 728; Green v. Long, 2 Caines' R. 90; Coons v. Robinson, 3 Barb. S. C. R. 625; Cock v. Weatherby, 5 S. & M. 625; 1 Starkie on Slander, p. 85. The decision in Chandler v. Holloway, 4 Port. 17, does not conflict with the view here taken. In that case the charge was, that the plaintiff had "killed" a certain person; which charge might have been true, and yet plaintiff not have been guilty of a felony.

2. We are authorized by our statute to assign for error the judgment on the demurrer, though an amendment was allowed; especially as the plaintiff was required, as a condition to the allowance of an amendment, to pay the cost and prove the death.—Code, § 2255. The suit, having been brought

before the Code was adopted, is governed by the old law, which is more comprehensive.—Clay's Digest, p. 334, § 121; Fontaine v. Lee, 6 Ala. 889; Smith & Garey v. Awbrey, 19 *ib.* 63.

3. The court erred in admitting the question put to Clayton and his answer thereto, viz., that, though he did not recollect defendant's telling him that his communication was private and confidential, yet he "so received and understood it." It was but the statement of the conclusion or opinion of the witness, and his answer shows that he did not know the facts upon which the conclusion depended. The words used were actionable in themselves, and the law implies malice in their use. This malice is what the law intends to punish, and it cannot be affected by the manner in which the words were received by the person who heard them. If the fact that the charge was communicated to the witness when no other person was present, is to protect the defendant from damages, might he not repeat the same story to every citizen in the county in the same manner, and if they, though not requested, received the communication "as private and confidential", then invoke these circumstances to protect himself against the punishment which he deserves? The rule which allows the defendant, under the general issue, to prove all the circumstances under which the words were spoken in mitigation of damages, contains this proviso, viz., that the circumstances offered to be proved must tend to show the absence of malice, or to rebut its presumption. For any other purpose the attending circumstances have never been admitted; and if they do not tend to this purpose, they are incompetent.—Root v. King, 7 Cowen's R. 613; Wormouth v. Cramer, 3 Wend. 395; Arrington v. Jones, 9 Port. 139; Douge v. Pearce, 13 Ala. 127. The evidence here, so far from showing the absence of malice, discloses the character of a cool, deliberate, and astute slanderer; cunningly and secretly blackening the name of his victim in the estimation of those with whom he may most injure him, and at the same time protecting himself from exposure and punishment by leaving the impression that his communication is "private and confidential." Such an abuse of the rule will not be tolerated.

4. To ascertain whether the evidence was relevant, is to

determine whether it tended to prove the issue joined. The issue joined was, whether the defendant spoke the words laid in the declaration; with liberty to him, if he had done so, to show the absence of malice in mitigation of damages. Under this issue, the defendant was allowed to prove, that he told the witness, in the same conversation in which he used the words laid, that his wife was greatly distressed on account of the death of her son. The statement of this evidence is sufficient to show that it was illegal, and that its only effect could be to mislead the jury, by creating in their minds a false and illegitimate sympathy for the defendant. It is said, that this evidence was competent, because it was a part of a conversation called out by the plaintiff. But the rule here invoked goes no further than to allow all the conversation that is competent and legal within itself, and relevant to the issue joined, and is only illegal because made by the declarations of the party desiring to use them.—7 Phil. Ev. 340.

5. The eighth charge given by the court was erroneous. Privileged and confidential communications have a technical legal meaning. They form an exception to the general rule, that the law implies malice from the use of words which are actionable in themselves. What privileged and confidential communications are, is fully shown by the case of White v. Nicholls, 3 How. U. S. R. 266; and that case is fully sustained by the following authorities: Proser v. Bromage, 4 Barn. & Cr. 247; Pasley v. Freeman, 3 Term R. 51; Vanspike v. Cleyson, Cro. Eliz. 541; Jarvis v. Hatheway, 3 Johns. 180; O'Donaghue v. McGovern, 23 Wend. 26; Easley v. Moss, 9 Ala. 266; Sewall v. Catlin, 3 Wend. 291. To bring a case within the first exception, the author of the slander must have acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests. But this charge assumes, that one man may slander his neighbor to any extent; *provided*, he does it in a private and social way, and one of the parties feels an interest in the subject. If this be the law, no slanderer could be too vile to escape. The law, however, demands that the communication should be required for the protection of the interest of one party or the other.—Grimes v. Coyle, 6 B. Mon. 301. Conceding that such a construction could be given to this charge

as to make it conform to the law, it would still be erroneous, because there was no evidence upon which to predicate it. It is evident from the proof, which is all set out in the bill of exceptions, that the jury were bound to find a verdict for the plaintiff; and that they did not do so, can only be accounted for on the supposition that they were misled by the charge, which was its necessary tendency.—Hollingsworth v. Martin, 23 Ala. 591; Carter v. Chaudron, 21 *ib.* 72; Seawell v. Henry, 6 *ib.* 226; Foulmin v. Lescene, 2 *ib.* 359; Cothran v. Moore, 1 *ib.* 423; Morrison v. Judge, 14 *ib.* 182; 23 *ib.* 655.

M. J. TURNLEY, *contra*:

1. The demurrer to the declaration ought to have been sustained. Each count was defective in not averring the death of the person alleged to have been murdered. If the words, "He is a murderer," are in themselves actionable, and require no *colloquium* alleging the death of any particular person, it is because of the well-known fact that many murders have been committed, and the charge would imply that the accused was guilty of some of them. But where the charge goes further, as in this case, and specifies the particular individual alleged to have been murdered, it is no longer a general term of known legal import, but requires an additional averment of the death of that individual to make it actionable. A charge of the murder of A, who is known to be still living, is not a crime punishable by law, and cannot subject the accused to the penalties of the law against murder. In support of this position, see Chandler v. Holloway, 4 Port. 17; 1 Starkie on Slander, p. 79.

2. The testimony of the witness Clayton was properly admitted. Under the plea of not guilty, the defendant was authorized to prove all the circumstances attending the speaking of the words in mitigation of damages.—Williams v. Cawley, 18 Ala. 206; Wright v. Lindsay, 20 *ib.* 428. It was shown that defendant and Clayton were intimate friends of long standing; that defendant had received a letter in relation to the death of his son; that he and his wife were much distressed on account of their son's supposed death; that he and Clayton were alone, going to a neighbor's house to get him to read the letter. All these circumstances conclusively show,

that the words were spoken in private confidence, and that they emanated from a sorely troubled heart, and were uttered in deep grief and not in malice. The evidence objected to was not the statement of a conclusion or opinion of the witness. The witness *knew*, from the intimacy and friendship long subsisting between him and defendant, and from all the circumstances attending the communication, that it was private and confidential; and he did not need to be told so by the defendant.

3. The communication was certainly, not only private and confidential, but also privileged.—1 American Leading Cases, p. 180. The evidence was admissible, not only because the communication was private, and confidential, and privileged, but for the purpose of showing the circumstances under which the words were spoken, as tending to show the want of malice. Williams v. Cawley, and Wright v. Lindsay, *supra*.

4. The same authorities show that the charge of the court on the subject of private and confidential communications was correct.

5. Plaintiff having proved a part of the conversation between Clayton and the defendant, the latter had a right to the whole of the conversation, and all the attending circumstances.

6. If the evidence objected to not only failed to show the want of malice, but, as the appellant insists, "*disclosed the character of a cool, deliberate, and astute slanderer*," how was the appellant injured by the admission?

CHILTON, C. J.—There are some old cases which would justify the court in holding the original declaration in this case bad. The case of Sir Thomas Holt v. Aftgrigg, 2 Cro. R. 184, may be cited. In that, the words were, "Sir Thomas struck his cook on the head with a cleaver, and cleaved his head; the one part lay on one shoulder, and another part on the other." The verdict against the defendant was arrested in the King's Bench, upon the ground, that "slander ought to be direct, against which there may not be any intendments." See also Prichard v. Hawkins, *ib.* 215; Holland v. Stoner, *ib.* 315; 4 Co. R. 20; Roll. Ab. 72; Hob. 6, 77, 177.

The doctrine upon which these, and a number of odd cases

rests, to-wit; that slander must be direct so as to exclude every intendment, and that words, in all cases, must be taken *in mitiori sensu*, has been exploded for more than a century. As far back as 1721, the same court held, that to say of a certain person "that is the man who killed my husband," is actionable.—8 Mod. 24. Pratt, C. J., in delivering his opinion, said, "We are to understand words in the same sense in which the hearers understood them; but when words stand indifferent, and are equally liable to two distinct interpretations, we ought to construe them *in mitiori sensu;* but we will never make any exposition against the plain, natural import of the words."

Fortescue, J., said, the rule, to expound the words in the milder sense, had at that time been exploded fifty or sixty years.

So, in a late case, Tomlinson v. Brittlebank, 4 Bar. & Adol. 630, it was held, the words "he robbed J. W." were actionable, as imputing an offence cognizable by law, and that if the words were used in any other sense, the defendant must show it.

The true rule requires, that words should be construed according to their obvious meaning, and taken in that sense in which those who hear would understand them.—McGowan v. Manafee, 7 Mon. R. 315; Hoyle v. Young, 1 Wash. R. 152; Hay. R. 116; 2 Dev. & Bat. R. 274; 9 New Hamp. R. 156.

Applying this rule to the facts averred in the declaration, we entertain no doubt that the declaration demurred to was sufficient. When it is said, A murdered B, the sense in which such expression would be understood evidently would be, that A killed him under such circumstances as would constitute him guilty of the crime of murder; and the words clearly imputing an imputation of the crime of murder, we are not prepared to say, that if those in whose presence and hearing they were spoken had well grounded reason to believe the person said to have been murdered was dead, the plaintiff, who is the sufferer by the slander, should not recover, although the defendant may prove that the person alleged to be dead is still alive. That he would be so liable, was expressly decided by the Supreme Court of North Carolina.—See Tugart v. Carter, 1 Dev. & Bat. 8.

So in Tenney v. Clement, 10 New Hamp. 52, it was held,

in an action for words charging the plaintiff with the crime of murder, that it was not necessary to allege or prove the death of the person said to be murdered—that it was sufficient if the existence of the person alleged to have been murdered was not known to those in whose presence the words were spoken. This is merely giving effect to the rule previously laid down—that is, construing the words in the sense in which the bystanders may fairly understand them.

It follows from what we have said, that the court improperly sustained the demurrer to the declaration as it originally stood. The plaintiff, however, did not repose upon the decision, and seek a reversal in this court, stopping the cause at that stage of the proceeding, by suffering judgment to be rendered on the demurrer. He amended his declaration, and went to trial on the declaration as amended, and thus waived his right to review the decision of the court upon the demurrer. Such was clearly the law before the statute (Caldwell v. May, 1 Stew. 425), and the statute only reserves the right to review the decision of the court upon the demurrer when the court overrules such demurrer, and the demurrant pleads over.—Clay's Digest, p. 334, § 121.

In relation to the confidential communication of the words charged as slanderous, as proved by the witness Clayton, we need only observe, that, although they do not fall within the class of privileged declarations which constitute exceptions to the general rule of implying malice from slanderous expressions, yet that they were received by an intimate friend, to whom alone they were communicated at that time, as private and confidential, certainly goes as a circumstance to mitigate the damages, as tending to disprove malice.

Privileged communications are said to be of four kinds—

1. Where the author of the alleged slander acted in the *bona fide* discharge of a public or private duty, either legal or moral, or in the prosecution of his own rights or interests.

2. Anything said, or written, in good faith, by a master, in giving the character of his servant who has been employed by him.

3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used; and

4. Publications duly made in the ordinary course of parliamentary proceedings; as a petition printed and delivered to the members of a committee appointed by the Legislature to hear and determine grievances.—White v. Nicholls, 3 Howard's U. S. Rep. 266.

So, also, expressions of suspicion, based upon facts detailed, confidentially and prudently made to discreet persons, in good faith, to direct their watchfulness and enlist their aid in the detection of persons supposed to be guilty of felony, which expressions are not more extended than the circumstances of suspicion justify, give the party injured no right to maintain an action of slander, since the public interest requires that such communications should be made, that offenders may be detected.

Applying these rules to the case before us, we think that Clayton might well testify that he received the communication from the defendant as private and confidential, in the absence of an injunction of secrecy, or of any declaration on the part of the defendant that they should be so regarded. That he so received and understood the communication, was a fact to which he could testify; but whether the words spoken were so intended by the defendant, or if so intended, they were notwithstanding prompted by malice, was a question for the jury.

Nor was there any error in the charge, that confidential communications made in the usual course of business, or of domestic or friendly intercourse, should be liberally viewed by juries.

What the defendant said to Clayton, as to the distress of his wife by reason of the receipt of the news of the death of his son, was not entirely foreign from this case. It served to show the condition of the defendant at the time he spoke the words, and tended to show that these words were prompted by grief, rather than by malice. It tended to explain the motive, and may be considered as part of the *res*.

We have carefully examined the charges of the court, and are of the opinion, when they are referred to the testimony in the cause on which they are predicated, they correctly assert the law applicable to the case.

There is no error in the record, and the judgment is affirmed.

LOCKE'S EXECUTOR *vs.* PALMER ET AL.

1. On bill filed to have a deed absolute on its face declared a mortgage, a writing executed by the grantee several months after the original deed, reciting that it was agreed between him and the grantor, at the time the deed was executed, that if the latter re-paid to him by a specified day the amount of the consideration money expressed in the deed, then he would re-convey to him all the property therein mentioned, and binding himself to re-convey accordingly,—is evidence of the highest character against the grantee; and although it may not be sufficient, of itself, to show that the parties intended the deed to operate as a mortgage, yet if the other evidence in the case, taken in connection with it, establishes that to have been the purpose of the parties, or even renders it doubtful whether a mortgage or a conditional sale was intended, it is enough to induce a court of equity to declare it a mortgage.
2. The inclination of the courts of equity always has been, to lean against conditional sales, because an error which converts a conditional sale into a mortgage is not as injurious as one which changes a mortgage into a conditional sale; and this inclination is strongly manifested, whenever the transaction had its origin in a proposition for a loan, or the relation of debtor and creditor existed between the parties.
3. The fact that the debtor's notes are given up to him by the creditor, and no acknowledgment or other evidence of the debt retained, is a strong circumstance to show that the relation of debtor and creditor was destroyed, but it is not conclusive.
4. Therefore, in this case, a deed absolute on its face was declared a mortgage, on proof of these facts: That the transaction originated in a loan of money, and the relation of debtor and creditor existed between the parties; that some of the articles of personal property conveyed were not enumerated in the deed; that the creditor gave up the debtor's notes, and retained no evidence of the debt; that the creditor, about two months afterwards, acknowledged in writing that, at the time the deed was executed, it was agreed between them that, if the debtor re-paid to him by a specified day the amount expressed as the consideration in the deed, then he would re-convey to him all the property therein mentioned, and bound himself to re-convey accordingly; and that all the property, both real and personal, remained in the debtor's possession, without any agreement for rent or hire so far as the evidence disclosed.
5. Equity looks with a jealous eye upon sales of the equity of redemption to the mortgagee, and requires them to be established by the clearest and most convincing proof. (The evidence in this case was held insufficient.)
6. If a portion of the mortgaged property has been sold with the mortgagor's consent, and the proceeds applied towards the satisfaction of the debt, he may file a bill to redeem the residue.
7. *It seems*, however, that even if there had been no such sale, the mortgagor might, at his option, proceed for a redemption of all or any portion of the property; but if he files a bill to redeem a portion of it only, a decree in

his favor would be a bar to any other proceeding of the like nature upon the same contract.

8. The statute of non-claim does not apply to equities of redemption.

9. If a bill to redeem slaves is filed by two joint mortgagors, and the evidence shows that the slaves belonged to one of them only, this is no material variance.

APPEAL from the Chancery Court of Greene.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed in July, 1852, by Wm. M. Palmer and B. D. Palmer, late co-partners in trade doing business under the firm name of W. M. & B. D. Palmer, against Volney Boardman, as the executor of John Locke, deceased, and also as the executor of Wm. A. Locke, deceased; and its object was, to redeem two slaves alleged to have been mortgaged by complainants, in March, 1845, to said Wm. A. Locke. The material allegations of the bill are as follows: That complainants, being much embarrassed in their business, and hard pressed for money to meet their engagements, applied to Wm. A. Locke for a loan or advance of money; that said Locke agreed to advance about $3504 50 for them, if they would secure to him its re-payment, and as they could not give him personal security, he expressed a desire that they should make him an absolute conveyance, in fee simple, of certain real and personal property of which they were then seized and possessed; that in consideration of said loan of $3504 50, they accordingly executed to said Locke a deed, dated March 19, 1845, by which they conveyed to him, absolutely and unconditionally on its face, one hundred and sixty acres of land, on which they then resided, known as "Greene Springs," together with two slaves named Oliver and Silvy, and all the articles of household and kitchen furniture then in their possession at said watering-place; "that said deed, though absolute and unconditional on its face, was intended only to operate as a mortgage to secure the re-payment of said sum of money, and was so received and held by said Locke; that said Locke being in bad health, and complainants fearing that he might die before said money was re-paid, they applied to him to execute a writing setting forth the true nature of their said contract, and in compliance with their request said Locke

executed to them, on the 26th May, 1845, an instrument in writing, commonly called a defeasance, whereby he bound himself to re-convey to complainants said land and negroes and other property, provided they would re-pay to him said sum of money, loaned as aforesaid, on or before the first day of January next thereafter." These two deeds (the original conveyance and the defeasance) are exhibited with the bill, and prayed to be taken as part thereof.

The bill further alleges, that complainants remained in peaceable and quiet possession of said land and negroes, as well as of all the other property conveyed by said deed, during the lifetime of said Locke, and for several years afterwards, until some time in June, 1847, by and with the consent of said Locke and his executor, by paying interest on said sum of money so advanced to them; that said Locke died in June, 1845, after having made and published his last will and testament, of which he appointed his brother, John Locke, the executor; that said will was duly admitted to probate, and said John Locke qualified as executor; that some time in the spring of 1847 said executor applied to complainants to obtain their consent to sell said land and perishable property appertaining to said springs, and complainants, not being able to refund said money loaned to them as aforesaid, consented to a sale thereof, only reserving the said negroes and their right to redeem them; that thereupon said John Locke sold the said land to Henry Tutwyler, for about $3,000, and all the said perishable property for about $245, and about the same time took the said negroes into his possession, by and with complainants' consent; that said negroes continued in his possession until his death, which occurred in the year 1848, during all of which time he recognized complainants' right to redeem them; that said John Locke, previous to his death, had made and published his last will and testament, which was afterwards duly admitted to probate, and of which the defendant, Volney Boardman, was appointed executor; that said Boardman qualified as executor, and took possession of said slaves, and has continued to hold them up to the filing of the bill; that on or about the 11th May, 1847, but after the sale to said Tutwyler, complainants had a settlement with said John Locke in regard to said transaction, and on said

settlement were found indebted to him, on account thereof, in the sum of $1168 92, a copy of which settlement is now in the possession of said Boardman as executor; that complainants, not being able to pay said sum of money at that time, agreed to surrender to said Locke the possession of said slaves, as security for its payment, according to their original contract with Wm. A. Locke, and said John Locke agreed to hold said negroes as a security for said debt, subject to said defeasance; that he so continued to hold them, up to the time of his death, always recognizing complainants' right to redeem them, and never denying the same"; that since the said slaves went into the possession of said Locke, the girl Silvy has had three children; that they are now worth a great deal more than the sum of money for which they were pledged, and their reasonable hire would more than extinguish the balance due on the said debt; that complainants have several times applied to said Boardman for a settlement of their accounts, and tendered to him whatever balance might be found due him, if he would surrender said slaves, &c.

The prayer of the bill is, for an account of the balance due on said debt and of the hire of the negroes since they went into the possession of said John Locke, for a decree of redemption, and for general relief.

The original deed from the complainants to said Wm. A. Locke, and the writing called a defeasance, are made exhibits to the bill. The latter instrument is as follows:

"Whereas, on the 19th day of March last past, Wm. M. & B. D. Palmer, by their deed of that date, conveyed to me a certain quarter-section of land therein described, being the same on which the "Greene Springs" are situated, also two negroes by the name of Silvy and Oliver, and all the household or kitchen furniture belonging or attached to said Springs", &c., "all of which property is more particularly described in said deed, for the consideration of about $3,587, as well as I now recollect; and whereas it was agreed between the said Wm. M. & B. D. Palmer and myself, at the time of the execution of said conveyance, that if said Wm. M. & B. D. Palmer, or their assigns, should, on or before the first day of January next, re-pay to me the said sum of $3,587, or whatever sum is specified in said deed as the consideration

thereof, then, and in that event, that I would re-convey to them the said quarter-section of land, the said two negroes, household and kitchen furniture", &c.: "Now, if said Wm. M. & B. D. Palmer, or their assigns, shall, on or before the first day of January next, well and truly pay to me, or to my assigns, the said sum of $3,587, or whatever sum is mentioned in said deed as the consideration thereof, I do hereby bind myself, my heirs, and assigns, in the event of such payment, to re-convey to the said Wm. M. & B. D. Palmer, or their assigns, the said quarter-section of land, the said two negroes, household and kitchen furniture," &c., "conveyed to me by said deed, and immediately upon such reconveyance to deliver possession thereof to the said Wm. M. & B. D. Palmer, or their assigns.

"Given under my hand and seal, this 26th day of May, 1845.

"Test: John Locke." "Wm. A. Locke [seal]."

The defendant answered the bill, admitting that Wm. A. Locke died in June, 1845, and that his will was duly probated on the application of himself and his co-executor, John Locke; that John Locke also died in 1848,—his will was admitted to probate, and letters testamentary thereon granted to him on the 6th November, 1848. He alleges, that he and his co-executor had a settlement with the Probate Court, of their administration on Wm. A. Locke's estate, in August, 1848; that complainants never presented any claim to either of them against the estate of their testator, nor did they present any claim to him, as executor of John Locke, within eighteen months after the grant of his letters testamentary, and he had no knowledge whatever of the claim set up in the bill until a short time before the bill was filed. He denies that the deed was intended as a mortgage or security for money lent, or that the writing afterwards signed by Wm. A. Locke was intended to be a defeasance; alleges that, prior to the 19th March, 1845, said Locke had loaned complainants about $2,000, for the payment of which he held their notes without security; that about that time they applied to him to borrow more money, and proposed to secure its payment, together with the debt which they already owed him, by a mortgage on property, but said Locke refused to make any such arrangement, and proposed to advance the money which they needed if they

would sell and convey to him property worth the amount of the sums which they then owed and wished to borrow; that complainants assented to this proposition, and executed said deed in pursuance thereof, and said Locke then advanced the sum which they wished to borrow, and gave up to them their notes which he already held, which two sums together made the amount expressed in the deed as its consideration; that this was the full value of the property at that time; that the negroes were the individual property of Wm. M. Palmer, who executed a bill of sale for them to Locke for the expressed consideration of $800, a copy of which bill of sale is appended as an exhibit to the answer.

He further alleges, that the writing exhibited with the bill, though executed by said Wm. A. Locke, is not a defeasance, but operates only as a contract to re-sell to complainants the property conveyed by them, and that it is without consideration; that he and his co-executor returned these slaves in their inventory of Wm. A. Locke's estate, and they were so treated on the final settlement of his estate; that the settlement had between John Locke and the complainants in 1847, which is referred to in the bill, and which is attached as an exhibit to his answer, was not confined to the transaction with Wm. A. Locke, but included other matters, "and from that statement it would seem that John Locke purchased the said slaves from complainants by allowing them on said settlement $1168 92 therefor." He denies that John Locke ever held the slaves subject to complainants' alleged right of redemption; alleges that John Locke told him on his death-bed, as well as a short time previously, that complainants had annoyed him very much, in the then feeble state of his health, by importunities to sell the slaves to some one (thinks Dr. Kittrell's name was mentioned) who would permit them to redeem at some future time, and that he had refused to do so; denies, also, that complainants were consulted about the sale of the Greene Springs.

On bill, answer, exhibits, and proof, the chancellor decreed in favor of the complainants, and his decree is now assigned for error.

JAMES D. WEBB, for the appellant:

I. The deed is absolute on its face, and the answer denies

that it was intended as a mortgage or security for a debt. The complainants must prove that it was intended by the parties to be a security, and this proof must be clear and convincing.—Chapman v. Hughes, 14 Ala. 218; 13 *ib.* 247; 21 *ib.* 92; 2 Ired. Eq. 560; 4 *ib.* 335. The fact that Wm. A. Locke gave up to the Palmers, when they executed the deed and bill of sale, the notes which he held on them as the evidence of the debt they owed him, and did not take any evidence of the indebtedness from them to him of the consideration expressed in the deed, is a circumstance which shows that it was a sale, and not a security.—Robinson v. Farelly, 16 Ala. 475; Sewall v. Henry, 9 *ib.* 33. Locke could not, if the property failed to pay the debt on a sale, recover the balance.—Eiland v. Radford, 7 Ala. 727. The answer denies that Wm. A. Locke loaned the complainants money on deed of mortgage, or security; and insists that he refused to do so, and that the consideration expressed in the deed and bill of sale was the fair value of the property. The question of mortgage or absolute sale, is a question of fact.—Hopkins v. Thompson, 2 Port. 433. In this case, it is a mixed question of law and fact, to be determined from the bill, answer, exhibits, and proof. 1. The deed is absolute on its face. 2. The writing is not a defeasance. 3. The writing shows that it was a conditional sale—a nudo pact.—13 Ala. 247, 252. If it was a conditional sale, and upon consideration, the adequate remedy was at law, and not in chancery. 4. No witness is examined to prove how Wm. A. Locke considered the transaction; and it matters not how John Locke treated it—the question is, What was the contract between Wm. A. Locke and the complainants?

II. Admit that Wm. A. Locke intended it as a mortgage, and that John Locke so understood and treated it; still the allegations of the bill show that John Locke bought the complainants' equity of redemption in the slaves: the complainants allege in their bill, that they had a settlement with John Locke, on the 11th May, 1847, of the transaction with Wm. A. Locke.—Langdon v. Roane's Adm'r, 6 Ala. 518; Andrews v. Hobson's Adm'r, 23 *ib.* 218.

III. The claim set up in the bill, and attempted to be enforced, is barred by the statute of non-claim.—Jones v. Light-

foot, 10 Ala. 24; Humphres v. Terrell, 1 *ib.* 650; Freeman v. Baldwin, 13 *ib.* 247, 252.

IV. The bill should have been dismissed for misjoinder of parties. B. D. Palmer had no interest in the slaves sought to be redeemed, except as it was acquired by the conditional purchase from Wm. A. Locke by the writing of May 26, 1845: the slaves were the separate, individual property of Wm. M. Palmer.

WM. P. WEBB, *contra*:

I. The question presented by the pleadings is, whether the contract between the Palmers and Locke, as shown by exhibits A and B, was a mortgage, or a conditional sale. The Palmers say it was a mortgage. Exhibit A is an absolute deed; but exhibit B shows, that it was agreed between the parties, at the time of the execution of the deed, that the Palmers might redeem the property, and Locke afterwards reduced that agreement to writing.—Freeman v. Baldwin, 13 Ala. 253; 4 Kent's Com. 135, 140, 141; 8 Ired. Eq. R. 197. If it were doubtful whether it was a mortgage or a sale, equity will hold it a mortgage.—Turnipseed v. Cunningham, 16 Ala. 506, and authorities there cited; 8 Ired. Eq. R. 197. The transaction has all the badges of a mortgage, as laid down in the case of Eiland v. Radford, 7 Ala. 724, viz., 1st, the relation of debtor and creditor between the parties; 2d, the borrowing of money by the Palmers from Locke; and, 3d, the disparity between the value of the property and the price. The deed and defeasance must be construed together as one instrument and one contract.—Sewall v. Henry, 9 Ala. 24 to 33. A mortgage is a conveyance of an estate for the security of a debt; the defeasance is a condition upon which the estate is conveyed, usually inserted, though it may be by a separate instrument; and the character of the estate is determined by the intention of the parties, to be derived from their language.—4 Kent's Com., pp. 135, 140, 141. Locke bound himself, not to *re-sell*, but to *re-convey*; and the Palmers remained in possession for more than eighteen months. In McKinstry v. Conly, 12 Ala. 678, the word "*re-sell*" was used, and the court lay great stress upon it. In Eiland v. Radford, 7 *ib.* 724, the word "*re-purchase*" was used, as also in Free-

man v. Baldwin, 13 *ib.* 246; and in those cases the possession was changed.

II. The testimony shows that the parties considered it a mortgage.—See the depositions of Kittrell and Boykin. The statement, or settlement, made in May, 1847, calculates interest on the debt, and gives credit for the sale of real estate, &c.

III. The statute of limitations cannot bar the right to redeem, as the six years did not begin to run until the change of possession in May, 1847.—Sims v. Canfield, 2 Ala. 555; Freeman v. Baldwin, 13 *ib.* 252.

IV. The statute of non-claim does not bar the equity of redemption.—Duval v. McLoskey, 1 Ala. 745; Gordon v. Gibbs, 3 S. & M. 490; 11 Pick. 181. It is a technical trust, and not a claim.—Kane v. Bloodgood, 7 Johns. Ch. 90. The equity of redemption is not a claim to be presented to the executor within the meaning of the statute (Clay's Digest, p. 195, § 17); the mortgage was only an incident to the debt due from Palmer to Locke. The statute of non-claim does not affect the right to recover property upon a claim of title, as in this case: this is a proceeding to recover the slaves, and not a money demand. Can the title to property, real or personal, be barred by the statute of non-claim?—Johnson v. Ames, 11 Pick. 181. The complainants do not claim a debt from Locke's executor, but demand the performance of a specific duty—the specific performance of a contract; and the statute of non-claim is no answer to their demand.

But, if the court should hold that the statute of non-claim applies to an equity of redemption, then it is insisted, that the proof shows that the Palmers did claim the same from John Locke, as executor of Wm. A. Locke, and that he admitted their right; and further, that the statute should have been specially pleaded.—Mardis v. Smith, 2 Ala. 382.

V. If it is insisted that the Palmers should redeem all the property conveyed, the answer is, that the land and other property were sold by John Locke, as executor of Wm. A. Locke, with the consent of the Palmers, and the proceeds applied as a credit on the debt. The sale of a part of the mortgaged property does not affect the right of the Palmers to redeem the slaves.—Wilson v. Troup, 7 Johns. Ch. 37.

VI. The "statement," or settlement, which is relied on as

barring or releasing complainants' right of redemption, was not signed by either party, and merely shows how the debt then stood between them. If the transaction was intended as a mortgage, then the maxim applies, "once a mortgage, always a mortgage"; and the defendant must prove a release. If it was a sale of their equity of redemption, the price was inadequate. On these points, see McKinstry v. Conly, 12 Ala. 682, and cases there cited. John Locke admitted to Boykin, in 1848, as shown by Boykin's testimony, that he held only a lien on the property. If it were doubtful whether complainants released their equity of redemption by the settlement in 1847, the court would hesitate to declare it, as the price stated was only $1168. 92, when the testimony of Boykin and Williamson shows that the slaves were then worth $1,500.—2 Sch. & Lef. 673. Any subsequent parol agreement to prevent the equity of redemption is void.—Henry v. Davis, 7 Johns. Ch. 42. Courts of equity look with distrust and jealousy on a sale of an equity of redemption.—Hitchcock's Heirs v. U. S. Bank, 7 Ala. 443; Powell on Mortgages, vol. 1, p. 123, note.

VII. The bill of sale by Wm. M. Palmer to Locke was made at the same time with the original deed, and for the same consideration. It can have no effect upon complainants' right to redeem, as it was not necessary to perfect Locke's title to the slaves; and the defeasance expressly stipulates that complainants might redeem, and that Locke would re-convey.

VIII. In reply to the argument that the contract or agreement, as shown by exhibit B, was without consideration, the answer is, that Wm. A. Locke says, in this defeasance, that that agreement was made contemporaneously with the execution of the original deed.

GOLDTHWAITE, J.—The first question is, whether the transaction between the Palmers and William A. Locke was an absolute sale, or a mortgage. The first instrument which was executed conveys the title to the property unconditionally, and would, if taken by itself, be regarded as what it appears upon its face to be—an absolute sale. The instrument, however, which was executed in May, 1845, some two months afterwards, by Locke, recites that it was agreed between himself

and the Palmers, at the time of the first conveyance, that if the latter should re-pay to him, by the first day of January next thereafter, the amount of the consideration money expressed in the first deed, then he would re-convey to them all the property therein mentioned. This recital is unquestionably written evidence of the very highest character against the party by whom it was executed, and, although it may not be sufficient to show that the parties intended the first instrument to operate as a mortgage, still, if the other evidence in the cause, taken in connection with it, establishes such to have been the purpose of the parties, or even renders it doubtful whether a conditional sale or a mortgage was intended, it is enough to induce a court of equity to declare it a mortgage.—Turnipseed v. Cunningham, 16 Ala. 501.

There are, in most cases of this character, no tests which will enable a court to determine, with anything like positive certainty, whether a mortgage, or a conditional sale, was intended; but the inclination of equity, in such cases, is always to lean against the latter, for the reason, that an error which converted the transaction into a mortgage would not be as injurious as a mistake which changed a mortgage into a conditional sale; and this leaning is strongly manifested whenever the contract had its origin in a proposition for a loan, or the relation of debtor and creditor existed between the parties (Crane v. Bonnell, 1 Greene's Ch. 264; Robertson v. Campbell, 2 Call's R. 421; Turnipseed v. Cunningham, *supra*); these circumstances being regarded as amongst the circumstances tending to show that a mortgage was intended.—Eiland v. Radford, 7 Ala. 724.

Neither of these tests is wanting in the present case; and in addition to these is the fact, that a portion of the articles are not enumerated in the bill of sale. The purchase appears to have been in gross, without the value of the property in detail being contemplated; the re-sale is to take place, if the purchaser *re-pays* the purchase money; and the buyer, instead of taking possession of the property, allows it to remain with the seller without hire—or at least none is proved—when a portion of it was such as would readily have commanded hire, and another portion such as would have been liable to injury and deterioration in the wear and tear resulting from its use.

All these, and especially the possession of the property remaining with the seller, are inconsistent with the idea of an absolute sale. It is true, that it does not appear that the evidence of the debt due from the Palmers to Locke before the transaction was retained, or any acknowledgment taken for the money advanced; but this, though a strong circumstance to show that the relation of debtor and creditor was destroyed, is not conclusive.—Turnipseed v. Cunningham, *supra.* Upon a careful examination of the whole evidence, we have great doubt whether the parties contemplated an absolute sale. The inclination of our mind is, rather, that security only was intended; and such being the fair result of the evidence, we are bound by the principles which govern courts of equity in this class of cases, to declare the contract a mortgage instead of an absolute sale.

But it is urged on behalf of the appellant, that, conceding the instrument to be a mortgage, it is shown that John Locke, the executor of William A. Locke, subsequently purchased the equity of redemption in the slaves which were a portion of the property conveyed. The evidence to sustain this position consists of the memorandum of a settlement made in May, 1847, in the form of a debit and credit account, John Locke charging himself with the sales of the land conveyed, and the proceeds or value of other property, some of which is not embraced by the deed; and the account is balanced by giving credit of debts against the Palmers. The last item on the credit side of the account is, "Am't of Silvy and Oliver, $1168 92." This account is in the hand-writing of John Locke, and not signed by either of the Palmers. They allege in the bill, it is true, that by a settlement with John Locke they were found in arrears to the amount of $1168 92, and that he retained a memorandum of the settlement; but there is no positive evidence that this is the settlement they refer to, and it certainly is entitled to but little (if any) weight to show that they consented to the last item on the credit side, which is not admitted by them. "Once a mortgage, always a mortgage," is the rule that was correctly laid down by the chancellor; and under its influence, when the character of the instrument was determined, the equity of redemption became a necessary incident, and existed with it until it was

proved that they had parted with it. The testimony of the witness Boykin shows the virtual admission of John Locke, after the settlement in 1847, of the right of the Palmers to redeem; and the evidence of Dr. Kittrell is not irreconcilable with that right. He was to purchase the slaves from Locke, by assuming the debt then due, and hold them until the mortgagors paid him the money, or until the debt was paid by their hire. This was, in effect, but little more than the substitution of a third person in the place of the mortgagee; and the close and intimate relations which the same witness proved existed between himself and the Palmers, might have been their inducement for preferring him to become their creditor instead of Locke. Equity looks with a jealous eye upon sales of equity of redemption to the mortgagee, (Story's Eq. § 1019, and cases there cited,) and requires them to be established by the clearest and most convincing proof, which is far from having been done in the present case.

Another ground taken against the decree is, that as the contract was entire, the bill should have been filed, not to redeem the slaves alone, but the entire property conveyed. In reference to this, it is only necessary to say, that a portion of the property had been sold, and its proceeds applied to the satisfaction of the debt. If this had not been the case, however, we are of the opinion, that it is at the option of the mortgagor to proceed for the redemption of all or any portion of the property. That he seeks the aid of the court in relation to a part of the property only, cannot injuriously affect the mortgagee, as a decree for the redemption of that part would be a bar to any other proceeding of the like nature upon the same contract.

The statute of non-claim is also urged as a bar to the relief sought. That statute provides, that all claims against the estates of deceased persons shall be barred, unless presented to the executor or administrator within eighteen months after the grant of letters, or within that time after the claim shall accrue; with an exception in favor of infants, married women, and claims contracted out of the State.—Clay's Dig. 195, § 17. We are clear, this statute does not refer to claims of title, for the reason, that claims of such a character cannot, in any just sense, be said to be claims against the "estate" of

the deceased: on the contrary, the right to recover is based upon the fact that the property claimed does not belong to the estate. As to whether the statute would bar the damages arising from the detention of the property as against the estate, it is unnecessary now to determine. The failure to present the claim would not prevent the mortgagee from suing the personal representative of the mortgagor, in an action of detinue, and recovering the property, and at least nominal damages.—Trecothick v. Austin, 3 Mass. Rep. 29; Johnson v. Ames, 11 Pick. 173. In Sims v. Canfield, 2 Ala. 555, the bill to redeem personal property was, in connection with the statute of limitations, assimilated to an action of detinue, and by analogy held to be barred in six years after adverse possession. The same principle must obtain with regard to the statute of non-claim. The equity of redemption is simply the right of the mortgagor to the specific property after the debt for which it is bound is discharged; and in equity he is always considered as the real owner, until he is debarred from his right by judicial decree, or in some other mode.—4 Kent's Com. 136. The bill to redeem, in the aspect in which we are considering it, is governed by the same principles as the bill to foreclose, and if the latter is not affected by the statute of non-claim, the former cannot be.

The only remaining ground of objection is, that the title to the slaves was proved to be in one of the complainants alone, instead of both of them jointly. But this circumstance, as the mortgage is executed by them in their joint names, can make no difference. The bill is filed upon the contract as it was made. The mortgagee, by becoming a party to, and accepting the joint instrument, recognized the title of the other party as joint, and having done so, there is no good reason, in a suit of this kind, why he should be allowed to deny it.

Decree affirmed, with costs.

DURAMUS *vs.* HARRISON & WHITMAN.

1. In the adoption of the Code, the Legislature is presumed to have known the judicial construction which had been placed on the former statutes; and therefore, the re-enactment in the Code of provisions substantially the same as those contained in the former statutes, is a legislative adoption of their known judicial construction.
2. In a suit on a debt due from defendant to plaintiff individually, the defendant cannot set off a debt due to him by open account from a firm of which plaintiff is a member.—Code, §§ 2142, 2143.
3. Sections 2142 and 2143 of the Code construed.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

THIS action was commenced in March, 1854, and was founded on a promissory note, of which the following is a copy: "$1500. On the first day of February, eighteen hundred and fifty-four, we promise to pay Henry G. Duramus fifteen hundred dollars, for value received February 1st, 1852.

(Signed) "JAMES HARRISON,
"JAMES K. WHITMAN."

The defendant Harrison pleaded as a set-off an open account due to him from the firm of Cook & Co., of which firm plaintiff was a member; to which plea the plaintiff demurred, but the court overruled his demurrer. The same question was again raised by the charge of the court, and its refusal to charge as requested by the plaintiff. The plaintiff excepted to the rulings of the court, and took a non-suit; and he now assigns for error these several rulings of the court.

NAT. HARRIS, for the appellant:

A demand due by a firm cannot be set off against a separate debt due to one of the partners.—Hoyt, Ford & Robinson v. Murphy, 18 Ala. 316.

The language of the Code (§ 2240), as to the right in which the demand claimed as a set-off must exist, is the same as that of the old statute (Clay's Digest, p. 338, § 141) upon which the case of Hoyt, Ford & Robinson v. Murphy was decided. The debts must be mutual, not only under the old law, but also under the Code.

GEO. W. STONE, *contra*:

1. There is a wide distinction between these two cases: 1st, where a partnership sues, and the individual debt of one of the partners is sought to be used as a set-off; and, 2d, where a partner sues on an individual demand, and a partnership liability is pleaded as a set-off. The one case is an attempt to appropriate partnership effects to the payment of the individual demands of one of its members; the other is simply compelling a partner to pay a firm debt out of his individual funds.

2. The leading case in this State on the point raised by the record, is Von Pheel & McGill v. Conally, 9 Port. 452, on the authority of which the subsequent case of Hoyt, Ford & Robinson v. Murphy was decided. The former case is based on the well-established doctrine of a want of mutuality, which, under the statutes then in force, was not considered perfect. At that time there was no authority to sue the personal representative of a deceased partner, in the first instance, on a partnership liability: the liability to be sued, like the right to sue, was in the surviving partner alone. But the personal representative of the deceased partner, while no action could be maintained against him at law on a partnership debt, could sue on the individual demand of his testator, or intestate. This, the court contended, disturbed the mutuality of the debts, and on this idea alone they predicated their opinion in that case.

3. The act of 1839, (Clay's Digest, p. 324, § 67,) which was passed subsequent to the decision of Von Pheel & McGill v. Conally, removed some of the disabilities, but was clogged with qualifications and provisoes. The decision in Hoyt, Ford & Robinson v. Murphy, was made after the passage of that act; but it is worthy of remark, that the decision is based on the former case, and no mention whatever was made of the statute.

4. But it is not necessary for the purposes of this case that either of those cases should be assailed. This case may be affirmed, without disturbing either of them. The Code (§ 2142, last clause) now gives a perfect and co-equal right of action against "any one of the associates, or his legal representatives." The mutuality in the debts is now perfect; and the

reason ceasing, should not the rule be changed? The statute now being perfectly clear, and no decision having yet been made upon it, will the doctrine *stare decisis* justify a disregard of its clear, express, unambiguous language? The decision in Von Pheel's case, always doubtful in principle, has never given satisfaction either to the bench or to the bar; and in Hoyt, Ford & Robinson's it is not attempted to be justified. The recent change in the law now enables the court to get rid of the vexed question, without disturbing former decisions.

RICE, J.—The act of 1818 contained the following provisions: "Every joint bond, covenant, bill, promissory note, or judgment of any court of record of any State or territory of the United States, shall be deemed and construed to have the same effect in law, as a joint and several bond, covenant, bill, promissory note, or judgment; and it shall be lawful to sue out process, and proceed to judgment, against any one or more of the obligors, covenanters, or drawers of any such joint bond, covenant, bill, or promissory note, or against any one or more of the defendants to any such judgment." * * * "Whenever any cause of action may exist against two or more partners, of any denomination whatever, it shall be lawful *to prosecute an action* against any one or more of them." Clay's Dig. 323, §§ 61, 63.

Many years ago a construction was given by this court to this statute, which has ever since been adhered to. That construction was, that the statute gave to the *plaintiff* the right to consider the obligations of his debtors, *when partners*, as several as well as joint, and to proceed against them accordingly; but that this right of election was given to the *plaintiff*, and could not be exercised by the defendant. And therefore it was held, that a defendant in a suit founded on a promissory note, executed by him to the plaintiff, could not, under the statute, avail himself of an open account, due to him by a partnership of which the plaintiff was a member, as a set-off. Von Pheel & McGill v. Conally, 9 Porter's R. 452; Traun v. Gorman, 9 *ib.* 456.

About the time the foregoing decisions were made, the act of 1839 (Clay's Dig. 324, § 67) was passed, which gave a qualified right to any creditor of a partnership, to sue the repre-

sentatives of the deceased partner without first having prosecuted the surviving partners to insolvency. The decisions above cited were not in any way influenced by the act of 1839, because it was passed after they had been commenced. But long since that act was passed, in a suit commenced long after its passage, the case of Von Pheel & McGill, *supra*, was re-affirmed by this court in the case of Hoyt, Ford & Robinson v. Murphy, 18 Ala. 316.

This last decision was made in 1850. On the 5th February, 1852, the act was passed which adopted the Code; and under that act, the Code went into effect on the 17th day of January, 1853.

Section 2142 of the Code provides, that any one of the partners, or their legal representatives, "*may be sued* for the obligation of all. Section 2143 provides, that "when two or more persons are jointly bound, by judgment, bond, covenant, or promise *in writing* of any description whatever, the obligation or promise is, *in law*, *several* as well as joint; and suit may be instituted thereon against the legal representatives of such as are dead." Section 2240 provides, that "mutual debts, liquidated or unliquidated demands not sounding in damages merely, subsisting between the parties at the time of suit brought, may be set off, one against the other, by the defendant or his personal representative, whether the legal title be in the defendant or not."

Although section 2240 is, in some respects, different from the former law as to matters of set-off, it is substantially the same as the former law, so far as it has any bearing upon the case now under consideration. This is not denied by the counsel of the appellees; but he contends, that conceding this to be so, that section, taken in connection with sections 2142 and 2143, ought to be held sufficient to justify the allowance of the set-off relied on in the court below. In this, we differ from the counsel of the appellees.

The right to prove a set-off at the trial of a cause, and thus diminish or defeat a recovery, did not exist at the common law, but is the creature of the statute. The extent to which this right is allowed, must be determined by reference to the statute. A set-off in this State has never been supposed to be, in all respects, like a suit, although it is in the nature of a

cross action. Thus a set-off cannot be replied to a set-off; defendant relying on a set-off of an account under the sum of one hundred dollars, was not allowed to prove it by his own oath, although, if he had been plaintiff in the suit on the same account, he could, under the act of 1837, have proved it by his own oath.—Hall v. Cook, 1 Ala. 629; Hudnall v. Scott, 2 *ib.* 569; Bennett v. Armstead, 3 *ib.* 507.

We must take it for granted, that at the time the Code was adopted, the Legislature knew the construction which had been placed on the former statutes above referred to, by the several decisions above cited. And if, with this knowledge, the Legislature has re-enacted in the Code provisions which are substantially the same as those contained in the former statutes, such re-enactment is a legislative adoption of the known construction of those provisions.

According to the decisions above cited, the act of 1818 and the act of 1839, taken together, did not, *per se*, change the obligations of partners to pay *an account* due by them, from joint to joint and several. But those statutes gave to the creditor of a partnership "merely the right to *sue*, and by *the suit alone* to change the nature of a partnership obligation from joint to joint and several." In other words, the decisions cited settled the rule, that a statute which authorized the creditor of a firm to sue any one or more of the partners, or their legal representatives, did not, *per se*, make the obligation of partners *several*.—Smith v. Mallory, 24 Ala. 628.

As section 2142 of the Code does not declare that the obligation of partners is *several*, but merely authorizes all *to be sued* in the common name, or any one, or their representatives, *to be sued* for the obligation of all, we feel bound to apply to it the rule above stated, which was settled before the adoption of the Code; and to hold, that there is nothing in that section, which, *per se*, changes the obligation of partners from joint to joint and *several*, or justifies the ruling of the court below in allowing the *account* against the firm as a set-off against the plaintiff, who was a member of that firm.

We are confirmed in the correctness of our conclusion, by examining the provisions of section 2143. That section expressly declares, that when two or more persons are jointly bound, by *judgment, bond, covenant*, or *promise in writing* of any

description whatever, the obligation or promise *is, in law, several* as well as joint." Now we ask, why was there an omission to declare in section 2142, that the obligation of partners should be *several* as well as joint? This omission is significant, when we compare it with the former law and the decisions thereon, and with the explicit declaration found in section 2143, that certain specified joint obligations should, in law, be deemed *several* as well as joint.

Upon a careful examination of sections 2142 and 2143 of the Code, and the circumstances under which they were adopted, we pronounce their true construction to be as follows: The creditor of a firm may, if he chooses, commence a suit against any one of the partners, or his representatives, for the debt of the firm, whether it be due by account or otherwise. The effect of *a suit so commenced* is, to change, for all the purposes of that suit, the obligation of the partners from joint to joint and several, by virtue of section 2142. Although no such suit is brought, yet if the firm is bound by a "*judgment, bond, covenant,* or *promise in writing* of any description whatever, the obligation is, *in law, several* as well as joint," under section 2143; and, therefore, may be used as a set-off in a suit on a demand not sounding in damages merely, brought by any member of the firm against the owner of such judgment, bond, covenant, or promise in writing. But in such a suit, commenced by a member of the firm, neither of the sections above cited confers upon the defendant the right to use as a set-off *an account* due to him by the firm of which the plaintiff is a member.

As the demand set up as a set-off in the court below, was not a *judgment, bond, covenant,* or *promise in writing,* against the firm, but only *an account,* the court below erred in charging that it could be allowed as a set-off in this action; and for this error, its judgment is reversed, the non-suit taken below set aside, and the cause remanded.

OZLEY ET AL. *vs.* IKELHEIMER.

1. A deed of gift, conveying personal property to a married woman "for her own use and benefit alone", creates a separate estate in her, and excludes her husband's marital rights.
2. Where a bill in equity is filed against husband and wife to subject the wife's separate personal estate to the payment of a note executed by her, if the defendants in their answers admit the existence of a separate estate in the wife as charged in the bill, the court will not inquire into the regularity of the execution of the deed under which she holds.
3. If a married woman gives her written obligation for the payment of money, it will be presumed that she intended thereby to charge her separate personal estate; and therefore, if her creditor files a bill in equity to obtain payment out of her separate personal estate, it is not necessary that he should aver or prove her intention to charge that estate.
4. If the defendant does not take advantage in the court below, by plea or demurrer, of the want of proper parties to the bill, the objection cannot avail on error, unless the absent parties are indispensable to the rendition of a proper decree.
5. One who signed the note as co-maker with the wife, though he would be a proper party to a bill filed by the creditor to subject the wife's separate estate to its payment, is not an indispensable party, when it is averred that he is a non-resident and has no property in this State.

APPEAL from the Chancery Court of Shelby.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed in September, 1850, by Edward Ikelheimer against Gilbert Ozley and Barthena his wife. It alleges, that Mrs. Ozley, together with one Thomas Cost, executed certain promissory notes payable to complainant, amounting in all to about $800, which were still due and unpaid; that she has a "separate estate in certain personal property, consisting of three negroes and other things of less value, as will appear more fully by a copy of the deed of gift of said property which is hereto appended, and marked exhibit No. 2"; that said Cost is a non-resident of this State, and has no property within its limits out of which to satisfy said debt, or any part thereof; "that Mrs. Ozley absconds, so that the ordinary process of law cannot be served upon her, and has with her the larger portion of her property, and will remove the remainder, unless restrained by the order and

process of this court; and that thereby complainant will lose his debts, or have to sue for it in another State." The prayer of the bill is for an attachment, for a sale of so much of the property attached as may be sufficient to satisfy complainant's debt, and for general relief.

The deed of gift, as exhibited, purports to be executed by "Z. Cross", and conveys the property specified in it "unto Barthena Ozley, for the respect that said Cross has for her and her heirs", "to have and to hold for her own use and benefit alone." The name of "Z. Ozley" is signed to the deed as the grantor; but the clerk before whom it was acknowledged certifies, that "Z. Cross personally appeared", &c., "and acknowledged that he signed, sealed, and delivered the above deed of gift."

Gilbert Ozley answered the bill, alleging, that he and his said wife had separated before said notes were executed, and that a bill for divorce was pending between them at that time; admitting that his wife, at the time she signed the notes, had several negroes in her possession as her own property, "to which respondent sets up no claim whatever, and has no objection to their being made subject to the payment of her debts; and respondent insists, that he had no agency in giving said notes, and is in nowise responsible for the same, as he gave notices in writing, at the time he separated from said Barthena, of said separation, and notified all persons not to trade with her upon his liability."

Mrs. Ozley also filed an answer, admitting the execution of the notes as charged in the bill, but averring that she only signed them as surety for Thomas Cost, who was her son; also admits, "that at the time of, and before the execution of said notes, she was a married woman, the wife of Gilbert Ozley, and that she held a separate estate in certain personal property described in a deed of gift to her, and that exhibit No. 2 appended to complainant's bill is a correct copy of said deed of gift."

On final hearing, the chancellor granted the relief prayed by the bill, and his decree is now assigned for error.

Jas. E. Belser and Saml. Leeper, for the appellants:

1. The instrument referred to in the bill as showing that

appellant has a separate estate, which is set forth as part of the bill, shows that she has not a separate estate. "It is not enough that the body of the instrument was drawn in the proper form: it is required to be signed and sealed, before it could become the deed of any one; and the signature and seal of one man could not make it the deed of another." As the body of the deed shows it was intended to be executed by "Z. Cross", and as it never was executed by him, nor by any person for him, but was signed and sealed only by "Z. Ozley", it is inoperative.—Townsend v. Corning, 23 Wend. 442; Carter v. *Doe ex dem.* Chaudron, 21 Ala. 72-85.

2. Before the appellant could be charged with the payment of the claim of the appellee, it must appear (by allegations and proof), first, that the property mentioned in the bill was her separate estate; and, secondly, that she designed to charge it with the payment of the promissory notes set forth in the bill.—Conn v. Conn, 1 Maryland Ch. Rep. 212-217.

3. Even if the property was her separate estate, and she designed to charge it with the payment of said notes, it was erroneous to make her separate estate liable for the whole claim, because the insolvency of Thomas Cost, the principal debtor, is neither averred nor proved.—Conn v. Conn, 1 Md. Ch., *supra*, 219.

4. As it is averred in the answer that she is only the surety of Thomas Cost on said notes; as that averment is proved; and as the said Thomas Cost is not a party to the bill, although he is the principal debtor and a necessary party,—the decree for complainants is erroneous; and the bill should be here dismissed, because, after the fact was averred in the answer and duly proved, he went to trial without making Cost a party.—Batre v. Auze's Heirs, 5 Ala. 173. The complainant ought to have made the principal a party, in order that the surety might be protected by the decree, and not be compelled again to litigate the indebtedness alleged.—Oliver v. Dix, 1 Dev. & Bat. Eq. 158; Dozier v. Dozier, *ib.* 106; McMaken v. McMaken, 18 Ala. 576; Woodward v. Wood, 19 *ib.* 213.

5. In the absence of proof of the value of the separate estate, or of the value of the hire of the slaves, the decree for the speedy sale of the slaves cannot be sustained.—Bradford v. Greenway, 17 Ala. 797; Collins v. Lavenberg, 19 *ib.* 682.

6. The bill cannot be sustained under the act of 1846 giving attachments in chancery.—Morgan v. Sprague, 23 Ala. 524; Wright v. Cogswell, 1 McLean 471.

7. The allegation in the bill, and the admission in the answer, that it was her separate estate as shown by the deed attached as exhibit 2 to the bill, is not the allegation or admission of *the fact* that it was her separate estate, but is an allegation that the said deed showed it to be her separate estate. It is the allegation and admission of matter of *law*, and not of fact merely. Such allegations are not good as pleading, and such admissions are not evidence.—Crockett v. Morrison, 11 Misso. 3; Wright v. Cogswell, 1 McLean 471.

8. The bill is fatally defective, and no admissions in the answer and no evidence can help its defects.—Sandford v. Ochtalomi, 23 Ala. 669.

WHITE & PARSONS, *contra:*

A married woman may bind her separate estate by a promise in writing.—Roper on Hus. & Wife, vol. 2, p. 24; 2 Story's Eq., §§ 1398, 1399, 1400; Forrest v. Robinson, 4 Port. 44. As to her separate estate she is regarded as a *feme sole*.—Bradford v. Greenway, Henry & Smith, 17 Ala. 797; Jacques v. M. E. Church, 17 Johns. 548.

If the bill alleges facts which, in law, amount to an allegation of intention on the part of the wife to bind her separate estate, it is the same as a direct allegation of such intention.

The exhibit to the bill is evidently a mistake as to the signature. The deed purports on its face to be the deed of Z. Cross, and the clerk certifies that Z. Cross appeared before him and acknowledged its execution. Such a mistake will not be regarded, or will be considered as amended in this court.—McBroom v. McBroom, 19 Ala. 176. But if it is not a mistake, respondents cannot now raise any objection to the deed, as they admitted in their answers that she held a separate estate under the deed.—Toney v. Moore, 4 Stew. & P. 347; Harrison v. Mock, 10 Ala. 185, 194.

That Mrs. Ozley had a separate estate under the deed, see Strong v. Gregory, 19 Ala. 148.

Thomas Cost was not a necessary party to the bill, even if he had been within the jurisdiction of the court; and the alle-

gation and proof of his non-residence, and of the fact that he had no property within the reach of the court, is a sufficient excuse for not making him a party.—2 Port. 370; 20 Ala. 824; 10 Wheat. 168; 8 *ib.* 451, and note on pp. 454-6; 12 *ib.* 193.

The notes are joint and several, and the creditor's remedy was, as he might elect, against either one or both; and any defence which could have been made by the principal might also have been urged by the surety in this suit.

The bill is filed in two aspects—under the act of 1846 authorizing equitable attachments, and to subject the separate estate of a married woman to the payment of a debt contracted by her while covert. There is no intervening trust between her and the estate, and no joint estate in the property. A court of equity may render a decree against her as though she were sole.

CHILTON, C. J.—The bill is filed by the appellee to subject the separate estate of Mrs. Ozley, a married lady, to the payment of certain notes executed by Thomas Cost and herself to him. It charges that, at the time of the execution of the notes by her, she was the wife of Gilbert Ozley, and had a separate estate in three negro slaves, and other personal property, which it is said will more fully appear by a deed of gift exhibited with the bill and made part thereof. This deed purports to be a deed of gift from Z. Cross, but is signed "Z. Ozley", and the clerk who certifies to the acknowledgment says, in his certificate, that Z. Cross appeared before him and acknowledged the same to be his deed.

If the deed had been executed by Cross, there is no doubt that it would have created a separate estate in Mrs. Ozley, the property being limited "to her use *only*", which would exclude her husband as effectually as if the term "separate" had been employed. The intention clearly appears to create a separate estate; and where this can be gathered from the instrument, the particular language in which it is couched becomes unimportant.—See Jenkins v. McConico, at the present term, and cases there cited.

It is supposed, however, by the counsel for the appellants, that because this deed is not properly executed, the court could not regard Mrs. Ozley as possessed of a separate

estate,—the bill referring to it as vesting such estate, and the answers of both the husband and wife admitting that the wife has a separate property in the chattels attempted to be conveyed by it, as appears by the deed.

It is a sufficient answer to this objection, that there is no issue made by the pleadings as to the existence of a separate estate; its existence is an admitted fact in the case; and, under these circumstances, we will not stop to inquire into the regularity of the deed under which the defendant (Barthena) holds the property. We must assume that, although the wrong name is signed to the instrument, it is in equity the deed of the proper person—that is, that there exists a mistake in its execution which the court would rectify, and the concessions of the parties are predicated upon the equitable maxim that the Chancery Court may consider that as done which ought to have been done, and which the court upon a proper application could order to be done. Even laying the deed out of view, as being informally executed, it is competent to limit a separate estate by a parol gift; and as the true inquiry, in all such cases, is whether the wife has a separate estate which may be charged with the demand sought to be enforced against it, and not so much as to the manner of its creation, we should not be disposed to turn the complainant out of court, if he had properly averred the fact as to the existence of a separate estate, although he may have mistaken the evidence of the existence of that fact. We repeat, however, that the existence of a separate estate is an admitted fact in the case, and whether it is created by the deed, as the complainant alleges, or exists otherwise, is a matter of no consequence. The defendants admit that the deed does create such estate, and it is not for the court to refuse a decree because it cannot understand how it is the deed creates it. There are, doubtless, such facts connected with it, as in *equity* would make it available for this purpose.

But it is said, it is neither averred nor proved that Mrs. Ozley, in signing the notes, intended to create a charge upon her separate estate. We think the law is now well established in England, (and we have followed the English doctrine upon this subject,) that where a married woman gives her written obligation for the payment of money, it shall be intended that

the parties did not do a useless thing: the obligation was intended to create a liability, so far as she was capable of binding herself. Being a married woman, she cannot bind herself personally, either in law or equity, so as to justify a decree which shall bind her personally.—Francis v. Wigzell, 1 Madd. Rep. 264. As, therefore, Mrs. Ozley designed by signing the notes to accomplish something, and nothing could be accomplished if her separate estate is not liable, upon the maxim, "*ut res magis valeat quam pereat*", we are forced to the conclusion that she intended to charge her separate personal estate.

The doctrine, which for some time obtained in the English chancery courts, that the general engagements of a married woman in writing operate and are valid only as appointments made of her separate estate (see 2 Atk. 379; 2 Ves. 142; 3 Madd. 91; *ib.* 389), has been justly exploded; and it appears now to be the settled doctrine of those courts, that a *feme covert*, as to her separate estate, can enter into contracts in the same manner as a *feme sole*, and that her contracts, whether written or verbal, are equally binding, and do not operate merely upon the principle of appointments. Such was the doctrine asserted by Lord Chancellor Brougham, in the elaborate case of Murray v. Barlee, 3 My. & Keene 223; see, also, Owens v. Dickinson, 1 Cr. & Phil. 53; 1 Lead. Cases in Eq. (Hare & Wallace's notes) 397, *et seq.*

We entertain no doubt as to the correctness of the chancellor's decree upon this point.

In relation to the objection that Thomas Cost is not made a party to the bill, it is only necessary to observe, that the objection was not raised in any way in the court below, and that it is well settled such defect must be taken advantage of by plea or demurrer, and if it is not thus brought to the knowledge of the court below, this court will not reverse for want of a proper party, if he be not indispensable to the rendition of a proper decree. In this case, Cost might very properly have been made a party, but he is not an indispensable party. A decree can as well be made without, as with him before the court. The case of Robert Conn v. James Conn, 1 Maryland Ch. Rep. 212, 219, if it be conceded to be correct, does not apply to the case before us; for, in this case,

it is averred by the bill, and admitted in the answer of Barthena Ozley, that Cost is a non-resident of this State, and has no property in the State liable to the demand. Such being the case, the party complainant might well have omitted to make him a party, as no practical purpose could have been attained by bringing him before the court.—Marr's Executor v. Southwick, 2 Por. 351-370, and cases cited.

There is no error in the decree, and it is consequently affirmed.

TURNEY'S ADM'R *vs.* MORROW.

1. A simple contract creditor, without a lien, cannot go into equity for the collection of his debt; and therefore, where the purchaser of slaves at sheriff's sale left them in the possession of the defendant in execution, under a written agreement that the latter might be allowed to re-purchase them at a stipulated sum within a specified time; and the defendant borrowed the money and paid it over to the purchaser, who afterwards, without defendant's assent, assigned his bill of sale from the sheriff to the lender,—*held*, that these facts were not sufficient to enable the assignee to assert a claim to the slaves in equity for the re-imbursement of the money which he had advanced to the defendant.

APPEAL from the Chancery Court of Morgan.

Heard before the Hon. E. D. TOWNES.

D. C. HUMPHREYS, for the appellant.

THOS. M. PETERS, *contra*.

LIGON, J.—The bill in this case was filed by the appellant, as administrator of Daniel Turney, deceased, for the purpose of enjoining the execution of a judgment at law, and to assert and establish a trust in favor of his intestate in certain slaves named in the bill, in which the defendant Morrow claimed the absolute property.

It appears from the record, that the slaves in controversy once belonged to Morrow, and were sold by the sheriff of

Morgan county by virtue of executions in his hands against the goods of Morrow, and were bought by one Burlerson, who left them in the possession of Morrow, under a written agreement by which the latter, or any person for him, was allowed to re-purchase them at a stipulated sum to be paid to Burlerson on or before the 1st day of March, 1851. It further appears that, about the 1st March, 1851, Daniel Turney, the appellant's intestate, loaned to Morrow eight hundred and fifty dollars of the money paid to Burlerson on the re-purchase of the slaves, and that Burlerson assigned to Turney the bill of sale for the slaves which he had taken from the sheriff at the time of his purchase; but this was after he had entered into the contract for the re-purchase as above stated, and after the slaves had been delivered to Morrow under that contract, and the sum stipulated by it had been paid to Burlerson by Morrow. As far as the record discloses, this assignment was made without the assent of Morrow, who, from the proof, does not appear to have participated in it. It further appears, that Morrow proposed to give the intestate a lien on some of the slaves, to secure the payment of the sum of eight hundred and fifty dollars which the latter had loaned him to enable him to effect the re-purchase from Burlerson; but that this offer was never fully accepted by Daniel Turney, nor any terms agreed upon or reduced to writing to carry out the proposition made by Morrow. Upon this case, the chancellor, at the hearing on the pleadings and proof, dismissed the bill, without prejudice, and from his decree an appeal is prosecuted to this court.

The decree is correct. The appellant's intestate had no lien whatever on the slaves, and occupies no higher position with regard to them than any other simple contract creditor of Morrow. There is no trust raised in his favor, by the mere fact that Morrow used the money which he borrowed from the intestate in paying Burlerson the sum necessary to re-purchase the slaves. Nor is any trust in his favor created by the proposition or offer of Morrow to give him a lien on the slaves, to secure the re-payment of the sum loaned to him by Turney. Until this offer was agreed to by Turney, there was nothing to hinder Morrow from withdrawing it at any time he pleased; and there is no proof which shows that the

locus penitentiæ was ever taken from him during the lifetime of Daniel Turney, the intestate.

The assignment of the bill of sale from the sheriff to Burlerson, by the latter to the intestate, conferred no right in the slaves on the assignee; first, because at the time of the transfer the slaves were not in the possession of Burlerson; and, secondly, because he had, before it was made, parted with all claim he ever had to them, by receiving the sum which, by his agreement with Morrow, the latter was to pay for their re-purchase. As Morrow had the possession of the slaves at the time the money on the re-purchase was paid to Burlerson, that possession drew to it the title, so soon as the payment of the purchase money was completed, and Burlerson had nothing to convey.

The mere assignment of a paper title for personal property, when the property is in possession of another under such circumstances as are shown in this case, confers no right or claim, either in law or equity, on the assignee.

Upon the whole, this must be regarded as an effort of a simple contract creditor, without a lien, to go into equity for the collection of his debt, which cannot be allowed.

Let the decree of the chancellor be affirmed, at the cost of the appellant in this court, and in the court below.

NELSON ET AL. *vs.* BONDURANT ET AL.

1. In trespass to recover damages for injuries inflicted on a slave, which caused his death, it is not necessary to aver with particularity in the declaration everything that was done on the prosecution for the felony, nor to state what witnesses appeared, or what testimony was offered: an averment that the defendants were prosecuted before a justice of the peace, by whom they were required to enter into recognizances for their appearance at the next term of the Circuit Court to answer the felony, and that at that term of the court they were duly prosecuted before the grand jury, who made diligent inquiry into the charge, but found no indictment against any of the defendants, is a sufficient allegation of the prosecution.
2. A plea, averring that the defendant, at the time of the alleged trespass, had

the rightful and legal control and possession of the slave, under a contract of hiring from his owner; that the slave refused to obey him, and forcibly resisted the exercise of his lawful authority; and that he only inflicted such proper and moderate chastisement as was absolutely necessary to overcome such resistance and to subdue the slave, is a full defence to such action.

3. The wrongful sustaining of a demurrer to a special plea, when the defendant had the full benefit of all the facts alleged in it under his other pleas, is not a reversible error.

4. Trespass may be maintained by the owner against the hirer of a slave, for an illegal and forcible injury, causing the slave's death, committed while in the hirer's possession under his contract.

5. In the absence of an express stipulation, the owner delegates to the hirer the same right to punish and correct the slave which he himself has; but if the punishment inflicted by the hirer, when considered with a just regard to all the attendant circumstances, is either cruel or barbarous, he becomes a trespasser *ab initio*, and liable to damages at the suit of the owner.

6. But the mere fact that the slave was tied when the punishment was inflicted, and so secured as to prevent resistance on his part, does not affect the rights or liabilities of the parties.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. NAT. COOK.

TRESPASS VI ET ARMIS by John F. Bondurant, Sarah Bondurant, Mary E. Bondurant, James K. Armstrong and Lucy his wife, and Rebecca Bondurant, suing by her next friend John F. Bondurant, against Samuel Nelson, Joseph Gouldman, Z. B. John, Andrew Jackson, and Richard M. Booker, "to recover damages for the unlawful beating and killing by said defendants of a certain slave, named Sam, the property of the said plaintiffs." The declaration contained two counts, the first of which, after alleging the commission of the trespass complained of and the slave's death in consequence thereof, averred, that afterwards "the said defendants were duly prosecuted before one Young L. Roylston, then being a justice of the peace in and for said county, for the supposed felonious killing of the said slave; that afterwards, to-wit," &c., "the said defendants, before, and in pursuance of the order and requisition of the said justice of the peace, entered into their recognizance for their appearance at the then next term of the Circuit Court in and for said county, to be held on the fifth Monday after the fourth Monday of September, A. D. 1850, to answer the State of Alabama to the charge of committing the felony aforesaid; that afterwards, to-wit," at said term

of said Circuit Court. "the said defendants were duly prosecuted before the grand jury of said county, for the supposed felony aforesaid, and that said grand jury did then and there diligently inquire into the said charge against the said defendants, and did then and there find and prefer no bill of indictment against the said defendants, or either of them; and plaintiffs say, that said prosecution of these defendants, upon the charge aforesaid, was then and there ended and determined, and that no bill of indictment was found, either at said term or at any other subsequent term of said court, nor any other prosecution commenced against these defendants, or either of them, for said supposed felonious killing of said slave." In the second count the allegation is, "that said defendants, at a term of the Circuit Court held in and for said county on the — day of —, A. D. 1850, were then and there duly prosecuted before the grand jury for said county, for the supposed felonious killing of said slave, and that the said grand jury did then and there diligently inquire into the charge aforesaid, and did then and there find no bill of indictment therefor against said defendants, or any or either of them; and plaintiffs aver, that the said prosecution has been ended and determined, and that no bill of indictment has been preferred, or further prosecution had", &c.

The defendants demurred to each count in the declaration, but their demurrers were overruled, and they then filed several pleas; the defendant Samuel Nelson pleading separately, 1st, the general issue, and three other pleas, substantially as follows:

2. That before and at the time of the alleged trespass on the slave, this defendant owned, and had rightful and legal control, and actual possession and management of said slave, by virtue of a contract of hiring from plaintiffs for the year 1850, and that said term of hiring had not expired when said supposed trespass was committed; that the said slave ran away and escaped from him, and refused to obey his lawful and reasonable demands, and went to the plaintiffs; that said John F. Bondurant, acting for himself and his co-plaintiffs, then whipped the slave, and committed the said supposed trespass complained of in the declaration, and returned said slave to defendant; that the slave still refused to obey de-

fendant's lawful commands, and forcibly resisted the exercise of his lawful authority, and endeavored with a knife and axe which he seized to cut and strike defendant and all within his reach who attempted to assist in subduing him to obedience to defendant's reasonable commands; that defendant then whipped said slave, in consequence of his said resistance, and in self-defence, and with a whip inflicted moderate correction upon him; that he did not inflict any cruel or unnecessary punishment, but only such moderate castigation as was absolutely necessary, and that all the whipping he inflicted was insufficient to subdue said slave.

"3. That plaintiffs did not in any manner prosecute defendant in a criminal proceeding for committing said supposed felony in plaintiffs' declaration alleged, before any justice of the peace or grand jury in and for the State of Alabama, or otherwise, or in any manner endeavor legally to try or convict this defendant criminally for said supposed felony", &c.

"4. That plaintiffs did not prosecute this defendant before the grand jury of the county of Perry, or any other grand jury in this State, for the commission of the supposed felony, or offence, in plaintiffs' declaration mentioned, by any criminal prosecution or otherwise, and did not endeavor to try for or convict this defendant of said supposed offence in any manner whatever."

The pleas filed by the other defendants severally are the same as those above stated, except that, in their second plea, they aver that they were accidentally present when their co-defendant Samuel Nelson was endeavoring to subdue said slave, and that, at his special instance and request, they assisted him in overcoming the slave's forcible resistance, and in inflicting such moderate and proper punishment as was absolutely necessary to subdue him.

The minute entry recites, that the plaintiffs took issue upon the first plea, "and demurred to the second, third, fourth *and fifth* pleas; which demurrer, being considered by the court, was sustained as to the second and *fifth* pleas, and overruled as to the third and fourth."

It appears from the bill of exceptions, that the evidence adduced on the trial showed, in substance, the following state of facts: That the slave Sam was hired by the plaintiffs to

the defendant Samuel Nelson for the year 1850, and was in his possession under the contract at the time of the alleged trespass; that on Saturday night, in the latter part of April, the slave wanted a pass to go to his wife's house, but Nelson told the overseer not to let him go until the next morning, as the creek was so high that it was dangerous to cross it at night; that the overseer accordingly told the boy not to go until the next morning, but the latter disobeyed his orders and went that night; that when the overseer went into the field where the slaves were at work on Monday morning, Sam picked up a club, as soon as he saw him coming, put it under his arm, and left; that he went to John F. Bondurant's, who tied him and whipped him, inflicting about thirty blows with a handful of switches, and then sent him back to defendant Nelson by Mr. Jackson; that when the boy was brought back, Nelson took hold of him by the collar, intending to punish him, but the boy drew a knife out of his pocket, caught Nelson by the collar, and cut him with the knife in several places; that Nelson continued to struggle with him, and called to his wife to bring him a rope, but when she ran to his assistance the boy cut her in the face with the knife, and also attempted to stab a negro woman who ran up to her relief; that Nelson succeeded in throwing the boy, who, in falling, struck his head upon a root or stump; that the other defendants came up to the spot while the struggle between Nelson and the boy was going on, and with their assistance the boy was finally secured and tied, and was then whipped by Nelson, Jackson, and Booker; that between thirty and forty blows were inflicted on him with a whip, some of which cut the skin; that the boy resisted to the last, and was insolent and rebellious after he was finally turned loose.

This whipping was inflicted on Monday morning. The boy afterwards walked about the house and yard, but complained of being sick, and did no work; and on the Sunday morning following he suddenly died. The defendants offered evidence tending to show that, at the time they whipped the boy, they did not know that he had been whipped by said Bondurant as above stated. A *post-mortem* examination of the body was made by several physicians, some of whom testified, in behalf of the plaintiffs, that the slave's death was caused by the

whipping which he had received; while others testified, for the defendants, that the wound on the back of his head, received in his struggle with Nelson as above stated, was, of itself, sufficient to have produced death. On this point the bill of exceptions states, that "the physicians all concurred in the opinion, that if the death in this case was the result of the injuries the boy had received, it was impossible to attribute his death to any portion of those injuries—that it was the result of all the injuries taken together, and that all contributed their proportion; that the whipping which the boy received after being tied did not, of itself, cause his death, and that he might have died from some other cause than the injuries inflicted."

"Upon this state of facts, the court charged the jury—

"1. That if they believed from the testimony that Bondurant, one of the plaintiffs, whipped the boy, and that the boy's death was caused by that whipping alone, then these defendants would not be liable; or, if they believed that the injury which the boy received in the fall, while engaged in conflict with Nelson, was the sole cause of his death, then defendants were not guilty, and could not be made liable. But if the testimony satisfied them that the defendants whipped the boy, or were present and assented to and concerned in the whipping by the other defendants, and that the boy was tied hand and foot when he received the whipping, and that the whipping which he thus received from the defendants was by itself the cause of his death, or that the whipping which the defendants gave him, in connection with the other injuries, any or all of them, was the cause of the boy's death, the defendants would all be liable for his value.

"2. That if they believed the whipping was done by the defendants after the boy was securely tied, that Nelson had a right to whip him, and that he had a right to call assistance in punishing the boy; yet, if the whipping thus given, either by itself or in connection with other injuries which the boy might have received before the whipping, caused his death, defendants would be liable for his value to plaintiffs in this action.

"3. That although they believed that Bondurant whipped the boy, and that he received a severe injury from the fall while engaged in conflict with Nelson; yet, unless they be-

lieved that one or the other or both of these injuries, of themselves, caused the death of the boy, and that the whipping by the defendants had nothing whatever to do with his death, the defendants would be liable to the plaintiffs."

The defendants excepted to each one of these charges, and also to others which the court subsequently gave on the request of the jury for further instructions; and they requested several charges, which the court refused to give.

The rulings of the court on the pleadings, the charges given, and many other things which it is unnecessary to notice, are now assigned for error.

I. W. GARROTT and JOS. R. JOHN, for the appellants:

1. The killing of the slave being *prima facie* a felony, the civil remedy is merged in it.—McGrew v. Cato's Executor, Minor's R. 8; Morgan v. Rhodes, 1 Stew. 70; Holmes v. Middleton, 3 Port. 427; Minter v. Blackburn, 22 Ala. 613.

2. The declaration does not set out a sufficient prosecution of the criminal offence to entitle the plaintiffs to maintain their suit. It does not aver that plaintiffs gave evidence before the grand jury, or the justice of the peace, or in any way aided in the prosecution; nor that any witnesses were summoned before the grand jury, nor that anything was done by any person: the only averment is, that defendants "were duly prosecuted"; and this is not enough. The owner of stolen goods can only have restitution by bringing an appeal and giving fresh suit: if guilty of neglect, he is not entitled to recover.—2 Hawk. 244, §§ 55-6; *ib.* 238, § 48; *ib.* 239, §§ 50 to 52; 1 Hale's P. C. 540. Plaintiff must give evidence, or he cannot recover.—1 Hale's P. C. 546. Restitution was only allowed on conviction, or outlawry, or what was equivalent thereto.—2 Hawk. 240, § 53. If a thief takes goods from two, conviction must be had for both crimes; owner can only have restitution on his own conviction, or what is equivalent thereto.—1 Hale's P. C. 545; 2 Hawk. 240, § 52. If an indictment is found, and a *nolle pros.* entered, a civil action does not lie.—Goddard v. Smith, 1 Salk. 21; 6 Mod. 261.

3. The fifth plea, to which a demurrer was sustained, is merely the plea of not guilty, drawn in strict conformity to the law. The court clearly erred in sustaining the demurrer to it.

4. The action should have been case, instead of trespass. The slave was hired for the year, and died before the expiration of the term of hiring. The injury, if any, was to the reversionary rights of the plaintiffs, and not to their possession. 1 Chitty's Pl. 175; Campbell v. Arnold, 1 Johns. Rep. 511; Hilliard v. Dortch, 3 Hawks' Rep. 246; Copeland v. Parker, 3 Ired. 513; Hogan v. Carr, 6 Ala. 472. That the hirer is owner for the year, is shown by the cases of Ricks v. Dillahunty, 8 Port. 133, and Hogan v. Carr, *supra*.

5. The first and second charges are severally defective, in that they assume that plaintiffs could maintain their action without proof of possession, which is essential to such an action.—Castillo v. Thompson, 9 Ala. 937; Phillips v. McGrew, 13 *ib.* 255.

6. The third charge assumes, that the only fact necessary to a recovery is, that the whipping inflicted by the defendants had something to do in producing the slave's death. All the other evidence is withdrawn from the minds of the jury, and they are told that, if the whipping had any agency in producing the death of the slave, it was enough. All the circumstances under which the whipping was inflicted, showing that defendants were endeavoring to subdue the slave, are left out of view. The court erred in thus limiting the jury to the specific facts stated in this charge.—Holmes v. The State, 23 Ala. 16; Dill v. Camp, 22 *ib.* 249; Edgar v. McArn, *ib.* 796; Ladiga's Heirs v. Rowland & Heifner, 21 *ib.* 9.

7. The main question in the case is this: How far can a hirer, or any other person than the owner, go in endeavoring to subdue an obstinate and rebellious slave? It is submitted, that if one has the right to control the slave, he can inflict proper, moderate punishment upon him (as chastisement, and not in anger or revenge) until he is subdued; and if the slave is not made to yield by the application of such punishment, but continues rebellious, the hirer (or other person having control) may continue to inflict proper and moderate punishment, and, if death ensues, he will not be responsible to the owner. There cannot be any middle ground between the liberty of the slave and his absolute, unconditional submission to his master: if the slave cannot be compelled to submit by proper and moderate punishment, the rule of the master is at

an end, and the slave becomes a freeman.—Dave v. The State, 22 Ala. 23. "Every effort to extend to him positive rights, is an attempt to reconcile inherent contradictions."—Kinlock v. Harvey, Harper's (S. C.) Rep. 514. "In the very nature of things he is subject to despotism."—*Ex parte* Roylston, 2 Strob. Law R. 43.

WM. M. MURPHY, *contra*:

1. No action for a malicious prosecution will lie, until a discharge or acquittal; yet, if a bill be returned "Not a true bill", this is such a discharge as will authorize the bringing of the action.—Payn v. Porter, Cro. Jac. 490; White v. Fort, 3 Hawks' R. 267.

2. If a bailee destroy the thing bailed, trespass may be supported.—1 Chitty's Pl. 169, 172, and authorities there cited.

3. The plaintiffs did all in their power to secure the prosecution and conviction of the defendants: they caused them to be tried before a justice of the peace, and to be recognized in sufficient bonds for their appearance at court; and caused the matter to be brought before the grand jury, and diligent inquiry to be made. In the very nature of things they could not testify, as the trespass was committed by a bailee on property in possession of the defendants.

4. The killing of the slave by a barbarous whipping or beating, though without intention to kill, was unlawful.—Clay's Digest, p. 413, §§ 6, 7. If any illegal act be done, the party doing it, or causing it to be done, is responsible for all consequences resulting from the act.—Burton v. McClellan, 2 Scam. 434. It is not necessary that the act should be wilful: even if it be accidental, the plaintiff is entitled to recover. Leame v. Bray, 3 East 591, and numerous authorities there cited; Schuer v. Veeder, 7 Blackf. 342; Blin v. Campbell, 14 Johns. 432.

5. The right of Nelson to punish the slave for insubordination, and to use proper force to subdue him, is admitted; but it is insisted, that he had no right to kill the slave, unless in self-defence. If the slave was tied hand and foot, perfectly in the power of Nelson, and Nelson and the other defendants were in no danger; and if they continued to whip him, while thus bound, and the slave died in consequence of such whip-

ping, then the defendants became trespassers *ab initio*, and are responsible. The charges of the court, tested by these principles, are correct.

GOLDTHWAITE, J.—The demurrers to the several counts in the declaration were properly overruled. The averments in the first count, that the defendants below were duly prosecuted before a justice of the peace of the county for the killing of the slave, and entered into a recognizance for their appearance at the next Circuit Court to answer the supposed felony; and that at such term they were duly prosecuted therefor before the grand jury, who diligently inquired into the charge, and found no bill against the defendants, or either of them, we regard as a sufficient averment of the prosecution. It is not necessary to aver with particularity everything that was done, or to state what witnesses appeared, or what testimony was offered. If there was, in fact, no prosecution, or it was not carried on in good faith, or was not successful by reason of collusion between the parties, the defendants could obtain the benefit of these matters by proving the facts. The allegation that they were duly prosecuted before a tribunal having jurisdiction, is sufficient.

What we have said in relation to the first count, applies equally to the second, which charges in the same language the prosecution of the appellants before the grand jury.

In relation to the demurrer to the second plea, it is only necessary to observe, that we are satisfied that the facts alleged in that plea constituted a full defence to the action; yet, as the record shows that the defendants had the full benefit of this plea by the evidence offered to the jury under the other pleas, the sustaining of the demurrer is not, under such circumstances, a reversible error.—Goodwin v. McCoy, 13 Ala. 271.

The statement in the record to the effect that a demurrer was filed and sustained to the fifth plea, we presume must be a clerical mistake, as there is no such plea; and being left entirely in the dark as to what plea the demurrer applied to, we are unable to pronounce upon the judgment of the court in sustaining the demurrer, to any other than the plea we have already noticed.

As to the charge of the court, which, when taken in connection with the evidence on which it was based, may be regarded as asserting the proposition, that trespass could be maintained by the owner of a slave, for an injury causing his death, done by a person in possession under a contract of hiring, we think there was no error. It is true that the gist of the action of trespass, for injuries to real or personal property, is the damage done to the possession; but a constructive possession is all that the law requires, and it is deemed constructive, when the party who brings the action is the owner at the time the injury is committed, and has as such the right to the possession at that time; as in case of the destruction of property by a common bailee, or cutting down trees by the tenant at will, (Co. Litt. 57 a; *ib.* 200 b,) in which cases, says Mr. Greenleaf, the interest of the wrong-doer is thereby determined, and the possession immediately reverts to the owner.—2 Greenl. Ev. § 615. Where, however, the plaintiff's right to the property exists only in remainder, or reversion, the action must be case (1 Ch. Pl. 167); for the reason, that until the event happens, or the period arrives, which invests him with the actual right of enjoyment, he cannot, under his title as remainder-man or reversioner, be entitled to the possession. But if he occupy a position which gives him the right to resume the possession of his property upon the commission of the wrongful act, then, the instant this right accrues, he is regarded, upon the principle we have already adverted to, as having the constructive possession, so as to authorize him to maintain trespass for the act. The application of this doctrine to the particular case before us, is readily perceived. In every contract of hiring, the owner transfers no greater rights in relation to the slave than he himself possesses; and in every bailment of this character, a reservation is implied, requiring the bailee to treat him with humanity, and to discharge those duties which the law regulating the relation of master and slave requires from him. If he fails to do this, the contract is broken, and the owner can resume the possession.—Rasco v. Willis, 5 Ala. 38; Hogan v. Carr, 6 Ala. 471. And if the act is forcible, as well as unlawful, the owner can maintain trespass; the bailee not being entitled, as a right, to the possession for the

remainder of the term.—Gillian v. Senter, 9 Ala. 395; Hilton v. Caxton, 2 Bail. 95.

It appears from the bill of exceptions, that the court instructed the jury, in effect, that if the slave belonging to the plaintiffs, being first so secured as to be unable to resist, was whipped in that state by the defendants, and the whipping thus inflicted was one of the causes of his death, they were liable for his value. This was clearly erroneous. In all this class of cases, the question of liability must be referred to the character of the act. If lawful, there can be no liability; while, if unlawful, the actor is always liable to the injured party, at least to the extent of the injury actually sustained. The owner of the slave has the right of punishment and correction, being responsible to the law for its abuse; and in hiring to another person, in the absence of any express stipulation, he delegates to such person the same rights in this respect which he himself possesses; and the master by hire is only liable when he exceeds or abuses the authority which the owner and the law concede to him. He has the right to correct, but he has no right to be barbarous or cruel; and if the punishment inflicted, when considered with a just regard to all the circumstances which surround it—the character of the offence, and the offender; the necessity of maintaining discipline and enforcing obedience—is either the one or the other, it is denounced by our penal code (Clay's Dig. 431, § 1), and being unlawful, he is a trespasser *ab initio*, and subject to damages at the suit of the owner. The charge seems to lay some stress upon the fact of the slave being secured, so as to be unable to resist at the time of the whipping; but this cannot in any way affect the rights in respect to correction. If it is administered so as not to be obnoxious to the law—so the punishment is not cruel or barbarous—there is no liability even should death ensue. The charge of the court was erroneous, as it held the appellants responsible for the result of the act alone, without making their liability depend upon the illegality of the act.

As the views we have expressed will probably be decisive of the case on another trial, we consider it unnecessary to pass upon the other questions raised upon the present record.

Judgment reversed, and cause remanded.

FLOYD *vs.* MORROW.

1. When an execution, either from a court of record, or from a justice's court, is levied by a sheriff or constable on mortgaged property, the mortgagee, or his assignee, may interpose a claim and try the right of property (Code, § 2595) before the law-day of the mortgage.
2. On trial of the right of property between plaintiff in execution against the mortgagor and the mortgagee as claimant, it is error to exclude the claimant's mortgage from the jury, if it is not void on its face.
3. A mortgage conveying, among other personal property, "the hire" of certain slaves, "or the use of them the present year, and whatever negroes I (mortgagor) may hire next year to make a crop with, and the entire crop I may make this year and next," is not void on its face.

APPEAL from the Circuit Court of Conecuh.

Tried before the Hon. NAT. COOK.

TRIAL OF THE RIGHT OF PROPERTY in a yoke of oxen, between William C. Morrow, plaintiff in execution, and Jordan R. Floyd, claimant. The plaintiff's execution was issued on a judgment for $41 17, which he had obtained against one James W. Ritchie, and was levied by a constable on the property in controversy on the 9th August, 1854. The claimant having executed the statutory bond, a trial was had before a justice of the peace and a jury of seven men, which resulted in a verdict and judgment for the claimant; from which judgment the plaintiff appealed to the Circuit Court. On the trial in the Circuit Court, "the plaintiff proved a levy made upon certain property in the possession of James W. Ritchie, and established its value, and then paused;" and the claimant then offered in evidence a mortgage, dated May 18, 1854, together with the clerk's endorsement showing that it was proved and recorded on 3d June, by which the said James W. Ritchie conveyed to him certain articles of personal property, which are thus described in the deed: "Four yokes of steers, two mules, two sorrel mares, one sorrel three-year old colt, twenty-five head of cattle, thirty head of hogs, two wagons, one set of blacksmith's tools, household and kitchen furniture, and plantation tools, and the hire of Bill, Beck, Nathan, Lucy, and Henry, or the use of them the present year, and whatever

negroes I may hire next year to make a crop with, and the entire crop I may make this year and next." The condition of this mortgage is, "that if the said Ritchie shall and does well and truly pay, or cause to be paid, unto the said Floyd, or his certain attorney, the full sum of $787, ($534 80 due the first of January next, and $252 20, due the first of January, 1856,) together with any debt the said Ritchie may contract with the said Floyd, during this or the next year, for the redemption of the mortgaged property, then these presents," &c., shall be void, &c.

"The claimant then offered to show by evidence that the property levied on was the property with which the defendant in execution was making the crop the present year, which was mortgaged to claimant, and mentioned in the said mortgage, and offered the mortgage as evidence. To this the plaintiff objected, and the court sustained the objection to the introduction of the mortgage, both separately and in connection with the evidence offered; and thereupon the claimant excepted."

This ruling of the court is now assigned for error.

WATTS, JUDGE & JACKSON, for the appellant:

1. The mortgage was certainly unobjectionable on its face. The mortgage of the crop growing, and to be grown, is lawful.—Mauldin, Montague & Co. v. Robinson & Caldwell, 11 Ala. 980, and authorities there cited.

2. This mortgage gives the mortgagee the right to the possession of the property immediately.

3. The mortgagee can claim the property; and when such claim is made, it is the duty of the execution creditor, before he can sell the property, to pay the mortgage debt.—Code, § 2595.

4. The oxen levied on were included in the mortgage, and it was proposed to show this; and also to show that they were engaged in making the crop of 1854, which was itself mortgaged to the claimant. If the oxen, themselves mortgaged, can be levied on, the defendant in execution could not make the crop, in the making of which they were engaged; and thus a double injury would be done the mortgagee—the loss of the mortgaged oxen, and of the mortgaged crop. In this view of the case, it is insisted, that even if the mortgagee

could not, ordinarily, claim until the law-day of his mortgage, yet, when he has a present right, the plaintiff in execution cannot disturb it.

5. Section 2595 of the Code would be useless, if the mortgagee cannot claim until there has been a forfeiture. Independently of that statute, he could claim after a forfeiture.—P. & M. Bank v. Willis & Co., 5 Ala. 781; Hooks v. Anderson, 9 *ib.* 704; Magee v. Carpenter, 4 *ib.* 469. This statute says, that "the mortgagee" of the property levied on, may claim, &c. He is as much mortgagee before as after the forfeiture. The cases of McGregor v. Hall (3 Stew. & P.) and Purnell v. Hogan (5 *ib.*) were decided before the passage of the act of 1845 authorizing the mortgagee to claim; and that uses nearly the language of the Code. To hold now that the mortgagee cannot claim before the law-day of his mortgage, would be to decide that the act of 1845 and section 2595 of the Code have accomplished nothing.

N. Harris, *contra*:

The mortgage deed offered in evidence did not entitle the appellant to the possession of the mortgaged property until the first of January, 1855, the day on which the first debt fell due. It is settled law, in this State, that the mortgagor is entitled to the possession of the property until the law-day of the mortgage, unless the mortgage itself provides that the mortgagee shall take the possession before that day arrives. P. & M. Bank v. Willis & Co., 5 Ala. 780. There is no provision in this mortgage that the mortgagee shall take the possession before the law-day; the mortgagor had the right of possession until the first day of January, 1855, and the equity of redemption, and was in possession at the time of the levy; and the interest which he had was a valuable and clearly ascertained interest. The Code (§ 2455, ¶ 3) expressly subjects the equity of redemption, in either real or personal property, to execution, and provides that, when any interest less than the absolute title is sold, the purchaser is subrogated to all the rights of the defendant, and subject to all his disabilities. The defendant in execution, then, at the time of the levy, and even at the time of the trial, had such an interest in the property as was subject to levy. Section 2595 declares,

that "when personal property, mortgaged to another, is levied on by execution, the mortgagee, or his assignee, may discharge the mortgage debt; and then the sheriff shall sell, as well for the payment of the mortgage debt, as for the satisfaction of the execution." The issue, upon a trial of the right of property, is, (§ 2588,) "that the property levied on is the property of the defendant in execution, and liable to its satisfaction." Now all these sections must be construed together, so as to give effect to each one of them, and no construction should be placed upon them which would lead to any absurd result. The policy of the law is, to subject all property (except what is specially exempt from execution) and all interests to the payment of the owner's debts.

There are many reasons why section 2595 should not be construed to allow the mortgagee to interpose a claim before the law-day. He is not bound to receive the mortgage debt, nor is the mortgagor bound to pay it, until it becomes due; and the mortgage may, as in this very case, be intended to secure, not only certain specific debts, but also debts that might afterwards be contracted for the purposes specified in the deed. In such case, it is impossible for the plaintiff in execution to know the extent of the mortgage debts; and if he does not know the amount for which the property is thus bound, how can he know the amount he must pay, or offer to pay, for the satisfaction of the mortgage debt? Suppose the mortgage debt is $10,000, and does not fall due for ten years, —that the mortgaged property consists of several articles each one of which is sufficient to pay the debt, and that an execution for only $50 is levied on a small portion of the property; can it be contended that the fact of the levy makes the whole mortgage debt become due, and compels the mortgagor to pay it or be deprived of his property? Such a conclusion would be absurd, and would entirely defeat the creditor's right, secured to him by section 2455, to subject the equity of redemption to the payment of his execution, without paying the mortgage debt. It is true, the act of 1845 allowed the mortgagee to interpose a claim to the mortgaged property before the law-day of his deed; but then the equity of redemption was not subject to levy and sale, unless accompanied by possession. The Code (§ 2455) subjects to levy

and sale under execution an interest which was not subject by the previous law; and to hold that the right to interpose a claim, secured by section 2595, extends only to the right to put in a claim after the law-day, will harmonize the two sections, and no absurd consequences will follow. When the equity of redemption is sold before the law-day, the purchaser will be entitled to the possession until that day, and to the right of redemption; and after the law-day the mortgagee is bound to receive the mortgage debt, which is then easily ascertained. If the mortgagee is about to sustain any loss or injury by the sale or removal of the property before the law-day, equity can afford him ample relief now, as it could before the adoption of the Code.

Again; the mortgage was properly rejected as evidence, because it provides for the payment of debts that might be contracted after its execution, and is therefore fraudulent and void on its face as to execution creditors of the mortgagor.

It is also void as to the appellee, because it mortgages property not then in existence, but to be afterwards grown.

There was no proof, nor any offer to prove, that any debt was due from the mortgagor to the claimant; and the recitals in the deed itself are not evidence against the plaintiff in execution.—McCain v. Wood, 4 Ala. 258.

RICE, J.—When an execution from a court of record is levied by the sheriff on personal property mortgaged to another, the mortgagee, or his assignee, may, by virtue of section 2595 of the Code, try the right of property, as provided in chapter second of title second of the Code, *before the law-day of the mortgage has arrived.*

To deny this, is to deny any meaning to the words employed in that section, which profess to confer a right on the mortgagee or his assignee; for it is very clear, that under section 2587, the mortgagee, or his assignee, is authorized to try the right of property, whenever such execution is levied on such property *after the law-day of the mortgage.*

Sound exposition requires effect to be given to every significant clause, sentence, or word in a statute; and the two sections above cited must be held operative to the full extent above indicated.—Smith's Com. on Stat. 710.

But the execution, under which the levy in this case was made, is an execution for less than fifty dollars, issued by a justice of the peace, and levied by a constable. The claim is interposed under section 2833 of the Code, found in title three, which is apparently devoted to "proceedings in civil cases before justices of the peace." The claim is interposed by a mortgagee, *before* the law-day of his mortgage arrived. Such a claim cannot be sustained, unless section 2595 extends to the mortgagee, or his assignee, the same right, when the levy is made by a constable under a justice's execution, as when it is made by a sheriff under an execution from a court of record.

It has ever been, and still is, the right of an execution creditor in this State, by suit in equity, to compel the creditors or beneficiaries provided for by a fair and valid deed of trust or mortgage to sell the property, or close the trust, on equitable terms, whenever such deed, by the long credit given, or otherwise, becomes oppressive or injurious to him.—Dubose v. Dubose, 7 Ala. 235; Pope v. Wilson, 7 *ib.* 690; Tarver v. Roffe, 7 *ib.* 873.

Until the act of January 25th, 1845, (Pamph. Acts, p. 136,) the mortgagee could not, by interposing a claim, or by any other proceeding at law, prevent the personal property embraced by his mortgage from levy and sale under execution against the mortgagor, before the law-day of the mortgage. Many sales were made under execution of the mortgagor's interest, before the law-day. Such sales, almost invariably, resulted in the sacrifice of the property, and in working injury both to the mortgagor and mortgagee. To prevent such injury and such sacrifices of property, which had been mortgaged in good faith, was doubtless the main object of the Legislature in passing the act of 1845, and in a substantial re-enactment of it in section 2595 of the Code.

If personal property embraced by a valid mortgage, the law-day of which will not arrive for several years, is permitted to be sold under execution at law, experience has proved that injury therefrom must result, either to mortgagor or mortgagee, or to both. This ought not to be, when they have acted fairly in the execution of the mortgage. There is no necessity for such injury. The execution creditor can, as we have above shown, by bill in equity, obtain all he ought to

have. He is the party who ought to be compelled to resort to chancery; because the mortgagee, having fairly obtained a preference by his mortgage, ought to be permitted to stand on the defensive, and should not be forced (although he is allowed) to become an actor in a court of equity, to maintain an advantage honestly gained over other creditors.

If the execution creditor resorts to a court of equity, he must make the mortgagor and mortgagee parties to his bill. When a sale is decreed under such a bill, all the parties will be protected and benefited. Purchasers, knowing that the title under such a sale is free from encumbrances, will be more willing to give a fair price for the property. They will know what they are buying. The proceeds of such a sale will be greater than could result from proceedings at law. The honest mortgage and costs of the Chancery Court will be first paid out of those proceeds, and out of the surplus the execution creditor will be entitled to satisfaction.

Although, in certain cases, where the amount of the mortgage debt is known, the execution creditor may, if he chooses, pay it off, and sell, as shown in section 2595, yet he is not bound to do so in any case. He may resort to the Court of Chancery, as above shown, if he prefers it. And so, although the mortgagee may resort to chancery now, in any case where he could have resorted to it before the Code took effect, he is not bound to do it. He may interpose his claim, and try the right of property, before the law-day of his mortgage, if he prefers it.

The effect of section 2595 is, to secure to the mortgagee the right to elect whether he will interpose his claim at law, or resort to chancery for the protection of his interests under the mortgage; and if he elects to claim at law, his claim, although interposed before the law-day, must be sustained, if his mortgage is executed in good faith, and for a valuable consideration, and is duly recorded.

This right of election in the mortgagee is not confined to cases where the levy is made by a sheriff under an execution from a court of record, but exists in cases where the levy is made by a constable under an execution from a justice of the peace. The letter, and equity, and reason of the statute, embrace the one class of these cases as well as the other; and

in conferring this right on the mortgagee, no word is used, which excludes *him* from trying the right of property when the levy is made under a justice's execution.

The fact that a *constable* is not authorized to sell, as well for the payment of the mortgage as of the execution, furnishes no sound objection to the conclusions above announced; for it is obvious, there are many cases in which a mortgagee may, before the law-day, interpose his claim, but in which the execution creditor cannot discharge "the mortgage debt." For example, we state the case of a mortgage executed to secure the sureties of a public officer against loss by reason of his defaults. What is "the mortgage debt," in such a case, before half his official term expires? No man, nor court, can tell. It cannot be discharged by an execution creditor; yet under such a mortgage, a claim might be interposed by the mortgagees. This serves to show, that the Legislature conferred on the execution creditor a privilege much more restricted than was conferred on the mortgagee.

The court below erred in excluding the mortgage offered in evidence by the appellant, which embraced the property levied on and in controversy in this suit.—Wallis v. Rhea, 10 Ala. 451; 5 *ib.* 531; 7 *ib.* 698.

That mortgage is not void on its face.—Mauldin v. Robinson, 11 Ala. 980.

For the error of the court below in excluding the mortgage, its judgment is reversed, and the cause remanded.

DENSON ET AL. *vs.* MITCHELL AND WIFE.

1. The words of a devising clause in a will cannot, ordinarily, be carried beyond their just legal import and legitimate meaning, by any supposed general intent to be gathered from the preamble, or introductory part of the will; and it is only in cases of doubt, where the words of a bequest may, without doing violence to the apparent intent and the rules of law, be construed more ways than one, that resort is had to the introductory part of a will to aid in solving such doubt.

2. An express bequest of an estate for life negatives the intention to give the absolute property, and converts a superadded right of disposition into a mere power.
3. The introductory part of a will was in these words: "I, J. D., being at this time of sound mind, and in full possession of all my mental faculties, and knowing that I have to die, and desirous of leaving this will", &c., "*desire that my person and property shall, after my death, be disposed of as follows*", &c. In the first seven clauses next succeeding, the testator gave specific bequests of slaves to his several children, giving his sons the absolute property, and limiting the interest of each daughter to a life estate "not subject to the debts of her husband, and after her death to be equally divided among the heirs of her body"; and in the eighth clause he bequeathed to his wife several negroes, all of his household and kitchen furniture, stock of horses, cattle, &c., and plantation tools, "*all of which she is to have and hold during her natural life, and at her death to dispose of at her will and pleasure.*" There was no residuary clause, and no bequest over in default of disposition by the wife: *Held*, that the widow took but a life estate in the property bequeathed by this clause, with power to dispose of the remainder; and she having died intestate, that the property went to the testator's personal representatives, to be by him administered as in cases of intestacy.

APPEAL from the Chancery Court of Barbour.

Heard before the Hon. J. W. LESESNE.

JETHRO DENSON died on the 8th July, 1851, in Barbour county, Alabama, after having made and published his last will and testament, which was attested by three witnesses, and was as follows:

"I, Jethro Denson, being at this time of sound mind, and in full possession of all my mental faculties, and knowing that I have to die, and desirous of leaving this will, and after commending my soul to the mercy and safe-keeping of Almighty God, who gave it, desire that my person and property shall, after my death, be disposed of as follows, to-wit—

"1. That my body be decently interred by my executors.

"2. That my executors pay, out of the proceeds of my estate, all my just debts.

"3. I will and bequeath to my son Matthew Denson my negro man Moses.

"4. I will and bequeath to my son Archibald J. Denson my negro woman Nancy and her children, provided he takes up his permanent residence in Barbour county, Alabama; if he does not, then I desire my executors to sell her (Nancy) and her children, at public outcry, to the highest bidder, and

pay over the proceeds of said sale into the hands of Archibald J. Denson, as his part of the estate.

"5. I will and bequeath to my daughter Mary Pitts my negro woman Violet and her children, and one girl named Silvy, to have and to hold during her natural life, not subject to the debts of her husband, and after her death to be equally divided among the heirs of her body.

"6. I will and bequeath to my daughter Nancy Screws my negro woman Mahala and her children, to have and to hold during her natural life, not subject to the debts of her husband, and to be equally divided after her death between the heirs of her body. I also will and bequeath to my daughter Nancy Screws the eighth of a section of land on which she and her husband now reside," (particularly described,) "to have and to hold during her natural life, not subject to the debts of her husband, and after her death to be sold at public outcry, and the proceeds of the sale to be equally divided between the heirs of her body.

"7. I will and bequeath to my daughter Martha Mitchell my negro woman Morning and her children.

"8. I will and bequeath, to my wife Rebecca my negro woman known as Little Ferriby, and her children and grandchildren, with the exception of her daughter Nancy. I further will and bequeath to my wife Rebecca negro man George; also a woman known as Big Ferriby, and her three youngest children; also, two negro men, Cupid and Jack; also, a woman known as Old Nancy, and all of my household and kitchen furniture; also, fifteen head of stock cattle, five head of horses, one road wagon, and all of my stock of hogs, plantation tools, and farming utensils; all of which she is to have and hold during her natural life, and at her death to dispose of at her own will and pleasure.

"9. I will and bequeath to my wife Rebecca my three negro men, Charles, Handy, and Joe; also, two girls, Caroline and Chaney; also, my plantation; to have and hold during her natural life, and after her death to be sold at public outcry, and the proceeds of such sale to be equally divided between my children.

"I desire the above to be my last will and testament, and hereby appoint Randolph Mitchell and my wife Rebecca my

executors, and do hereunto affix and sign my name and seal", &c.

Of the testator's children named in this will, all of whom survived him, Martha, the wife of Randolph Mitchell, was the only child of his wife Rebecca; the others being born of a former wife. Mrs. Rebecca Denson afterwards died, to-wit, in January, 1852, intestate; and the slaves and other property bequeathed to her by the testator went into the possession of said Mitchell and wife, who claimed and held them as the separate estate of Mrs. Mitchell, as only heir-at-law of her mother. This bill was filed against them by the testator's other children, who insist that Mrs. Denson took but a life estate in the property; and they pray for an account, distribution, and general relief.

The chancellor dismissed the bill for want of equity, holding, on the authority of Randall v. Shrader, 20 Ala. 338, that the absolute property vested in Mrs. Denson under the eighth clause in the testator's will; and his decree is now assigned for error.

Buford & Pugh and Jas. E. Belser, for the appellants:

1. The importance of the introductory clause and preamble in a will, as manifesting an intention of complete and ultimate disposition, has been gradually declining in courts both of law and equity. "After some fluctuation, it is at length clearly settled, that, although they make profession of disposing of all the testator's property, in the fullest manner, they will not operate to carry the words of the devising clause beyond their legal sense and signification."—1 Roberts on Wills 432-435; Vanderverker v. Vanderverker, 7 Barb. S. C. Rep. 221.

2. Whatever a testator does not grant by his will, remains in him, and reverts to his heirs and distributees, after the dispositions actually made by him are over.—4 Kent's Com. 353, Lecture 53.

3. The extent of the estate given to the widow is express, certain, and clearly defined—"to have and hold during her natural life"; the superadded power, "at her death to dispose of" (the very same property which was granted to her for her life), is a distinct gift, not of an additional interest or estate, but merely of a power to dispose by will and not by writing *inter vivos*. Such a power of disposal, even if it were general,

in connection with an express estate for life so clearly defined, cannot operate by way of enlargement of the life estate into a fee. The implication, to control the technical meaning of words creating a previous express estate, must always be a necessary implication. No such implication arises here.—Caleb v. Field, 9 Dana's R. 346; Pate v. Barrett, 2 *ib.* 426; 16 Johns. 588; Rubey v. Barnett, 12 Misso. 3; 10 Ves. 370; 1 P. Wms. 149; Pulliam v. Byrd, 2 Strob. Eq. 134; Smith v. Hilliard, 3 *ib.* 214; Reith v. Seymour, 4 Russ. 263; 1 Salk. 239; Archibald v. Wright, 9 Sim. 162; 3 Litt. 415; Burwell v. Anderson, 3 Leigh's R. 355; Smith v. Bell, 6 Peters' Rep. 78-9; Ward v. Amory, 1 Curtis' R. 419; Keyes on Chattels, §§ 156 to 170.

"The express estate for life negatives the intention to give the absolute property, and converts these words into words of mere power, which, standing alone, would have been construed to convey an interest." "Where such inconsistent life estate is given, the fee does not pass; for this whole matter rests upon intention."—3 Leigh's R. 356-7, and authorities *supra*.

A. bequeathed a slave to his wife for her life, and after her death to be emancipated: *Held*, that although the provision for the emancipation was void, yet the slave did not belong absolutely to the wife, but, after her death, went to the next of kin, or passed by the residuary clause, if there was one.—Cresswell v. Emberson, 6 Ired. Eq. 151; Vanneson v. Culbertson, 10 Sm. & Marsh. 150; 7 Barn. S. C. Rep. 221. The principle of these cases is, that the testator expressly limits the duration of the estate to the life of the wife, and there is to be no enlargement of that estate by implication.

In a will, the grammatical construction must prevail, unless a contrary intent *plainly* appears.—Love v. Love, 5 Ired. Eq. Rep. 201.

ELMORE & YANCEY, *contra*:

1. The law never favors an intestacy as to any part of the personalty, when there is a will.

2. The general intention apparent in the will must prevail, unless forbidden by law.—Heirs of Capel v. McMillan, 8 Por. 197, and authorities cited on pp. 204-5.

3. To ascertain the intention, every part of the will is ex-

amined and compared, the one with the other. In a case of doubt whether an absolute or limited estate is given, the introductory part of the will may be referred to for the purpose of solving it.—Schriver v. Meyer, (7 Harris,) 19 Penn. 87, where many of the cases are reviewed; Wood v. Hills, *ib.* 513.

4. This rule is educed: Wherever the introduction shows an intention to dispose of the whole of the testator's property, and it can be brought down to and connected with the devising clause, the introductory and devising clauses are construed together, and the interest devised thereby is an absolute one. 19 Penn. 87; 14 S. & R. 95; 10 Wheat. 204; 19 Penn. 513.

5. The property in the eighth clause of the will passed to the wife absolutely. 1st. A bequest of personalty for life, with a general power of disposition, not limited as to the objects or mode, gives the absolute estate.—Randall v. Shrader, 20 Ala. 338, and cases cited in the opinion; 2 Wilson 6; 3 Ves. 299; 1 Leon. 256; 2 Ves. 588; 2 Atk. 102; 1 Wash. (Va.) 266; 10 Mod. 71; 16 Ves. 135; 19 *ib.* 85. 2d. The intention of the testator was, to bestow this property absolutely on his wife. The introduction clearly shows an intention to dispose of "his property" (that is, of all his property) "as follows" (that is, as the same is given in the following nine clauses); and this necessarily connects the introductory and devising clauses, and of course the eighth is connected with the introduction. The language and meaning of these clauses is, then, that he desires his property in the subjects named in the eighth clause to be disposed of as follows, &c.

Again; looking at these and the other parts of the will, the variety of bequests and variety of limitations on the other bequests, and the variance between the limitations in the eighth and ninth clauses, the inference is plain—"such as will satisfy the conscience of the court"—that the object of the testator was to dispose of all his property, and to dispose of all his interest in the subjects mentioned in that clause. The eighth clause is by the terms of the introduction as much connected with it as the first clause is. This being the intention, the court will carry it into effect, as there is no prohibition of law against it.

The question is one of intention. We admit, when the limitation is for life, with a power of disposition, and the ex-

ercise of this power is restrained either as to the objects in whose favor it is to be exercised, or as to the manner in which it shall be exercised, the intention is apparent that this is but a power, and not an interest. Or, if there was a limitation over, in default of the appointment or exercise of the power, then, also, this is evidence that the power should not be an interest, but an authority merely. On this view most of the conflicting decisions may be reconciled.—1 Sugd. on Powers, mar. p. 127. We claim, however, the benefit of the converse of these propositions—that when there is no limitation over on default of appointment, and no restriction as to the objects or mode of exercise of the power, this is evidence of the intention to dispose of the property absolutely.

6. The words "at her death", following the words "during her life", are equivalent to "then", and will be considered as words of relation, and not of time; and that the remainder of the estate was to be disposed of at her will and pleasure; and that such disposition was to take effect at her death, and not that she was at the moment of her death to have the power of disposition; for that would mean after her death, which is impossible.—Tomlinson v. Dighton, 10 Mod. 71; Boraston's case, 3 Coke 21-2.

7. When a general power of disposition is reserved or given of property or a fund, in which the person having the power has no present interest, and can have none until a future event, as his death, the property or fund becomes his absolute estate on the happening of the event, without any exercise of the power.—3 Atk. 269; 2 Vern. 181; 3 Atk. 656; 1 Vesey 267; 2 Atk. 172; 3 Leigh 348; 12 Miss. 3.

The principle of these decisions is, that he who has such a power of disposition has all the attributes of ownership over the property at the time the interest is to take effect if the power was exercised; and we assent to this as sound sense and law. Mrs. Denson had an estate for life, with the unlimited power to dispose of the property at her death. Has she less of the attributes of ownership, than if she had been vested with the power of disposition at her death? Has she a less interest in the remainder, than if it had been to the children of Denson for the life of the wife, and at her death to be at her disposition? Yet this is admitted by all the authorities

to vest the absolute estate in her at her death. The particular estate, and the power of disposition, are the same in both the above suppositions. The only difference is, in fact, the particular estate is to be enjoyed by different persons.

These cases assert the following doctrine: "Where there is a particular limited interest, and this sort of power, liberty or authority, though the latter without a particular partial interest pointed out might have amounted to an absolute gift, yet when both occur, the gift is held to be of the limited interest, and the other to be but a power, and not an interest."

To analyze this: When a limited interest is given, with an unlimited power of disposition, the limitation of the interest is a limitation of the power. But if no "particular partial interest had been pointed out", but there had been a general interest pointed out, or no interest pointed out, then the power "might have amounted to an absolute gift"; and these seem to have been adopted by American authorities as sound reasoning. We think there are two errors in it: first, if there had been a general interest pointed out or given, the power was unnecessary, and could not enlarge the estate; and, second, the power is limited by the particular estate, and not the estate by the power. The power succeeding the mention of the property given is the limitation of the interest. How would it be, if in his will he gave to his wife the unlimited power of disposition at her death, and gave to his children during her life the enjoyment of the property, and by a codicil had confirmed this will in all respects, save that he altered the estate for life from his children and gave it to his wife; or by will gave the property to his wife for life, and at her death to his children, and by a codicil revoked the gift of the remainder to his children, and gave to his wife the unlimited power of disposition at her death; can it be doubted what must be the construction put upon the will? There is no difference in the cases, as to the legal effect. There is no limitation over in the will on default of appointment; and the children, not being named, stand precisely in the condition of the hypothesis, where the limitation of the remainder to them was revoked by the codicil.

The rule in the above authorities is one of construction only. They say, such an interest being limited is evidence

that the testator did not mean the power to be an interest, but an authority merely. But if, from the other parts of the will, or the peculiar phraseology, it appears the testator did intend this power as an interest, then these cases are of no authority, and the court will carry the intention into effect.

These cases hold, further, that if the testator give the property for life, with directions to sell at the death, and with a power to the tenant for life to dispose of the proceeds of the sale, the tenant for life takes an absolute estate in the whole proceeds.—1 Vesey 267; 3 Leigh 348. It is inconceivable how a bequest for life, with power to dispose of the proceeds when sold at her death, is an absolute estate, while a power to dispose of the property itself is a mere authority. It is a distinction without a difference; and the cases lose their weight as authority.

8. The negroes mentioned in the first sentence of the eighth clause were given absolutely. The two bequests in this clause are disjoined, and the first is given without any limitation.—4 McCord 60; 2 Strob. Eq. 327; Doug. 730; 8 D. & East 64.

Most of the cases cited by the appellants are cases in which there was either no power of disposition, or there was a limitation over, or the power was limited as to the objects or the mode of exercise.

Randall v. Shrader, 20 Ala. 338, is identical with the present case; the difference, if any, being in favor of the present case, as it is a will. The question in that case was, what interest did the wife take under the instrument? On the face of the writing, it was held, she took an absolute estate. The construction put on that deed and on this will must be the same. What interest did Mrs. Denson take under this will? The provisions in the will and deed are, in legal effect, and almost in language, the same. The decision was a correct one, and commends itself to the good sense of every mind, legal or otherwise.

On the question of intention: Lands to a devisee, to be by him freely possessed and enjoyed, passed the absolute estate, although no words of inheritance were added, without which it was but a life estate; but the intention was upheld.—1 S. & R. 144; 12 *ib.* 54.

CHILTON, C. J.—The leading object in the construction of every written instrument is, to arrive at the true intent and meaning of the parties to it; and if the courts can give effect to such intention consistently with the rules of law, they will do so. In the construction of wills, especially, we must struggle to arrive at the true desire and intent of the testator; and to do this, we should look to the whole instrument—the introduction, preamble, and different items and clauses, and see the bearing of each upon the clause to be construed. At the same time, however, the words of the devising clause can not be ordinarily carried beyond their just legal import and legitimate meaning, by any supposed general intent to be gathered from the introductory clause or preamble of the will. 1 Roberts on Wills, pp. 432-5. It is only in cases of doubt, where the words of a bequest may be construed more ways than one, without doing violence to the apparent intent and the rules of law, that we resort to the introductory part of the will for the purpose of aid in solving such doubt—19 Penn. 87; *ib.* 513.

We are of opinion, that in the introductory clause of this will there is nothing inconsistent with the possibility of a reversion back to the estate of the testator of the property mentioned in the eighth clause of the will. The language is: "I, Jethro Denson, being", &c., "and desirous of leaving this will", &c., "desire that my person and property shall, after my death, be disposed of as follows, to-wit." Then follow the several clauses, seven in number, making dispositions of portions of his property among his children, vesting life estates in his daughters, with remainders to the heirs of their bodies living at their death, until we come to the eighth, which is the clause we are called upon to construe, and which is in these words: "I will and bequeath to my wife Rebecca my negro woman known as Little Ferriby, and her children and grand-children, with the exception of her daughter Nancy. I further will and bequeath to my wife Rebecca negro man George; also a woman known as Big Ferriby, and her three youngest children; also, two negro men, Cupid and Jack; also, a woman known as Old Nancy, and all of my household and kitchen furniture; also, fifteen head of stock cattle, five head of horses, one road wagon, and all of my stock of hogs, plan-

tation tools, and farming utensils; all of which she is to have and hold during her natural life, and at her death to dispose of at her own will and pleasure."

Taking a common-sense view of this bequest, it would readily occur to the mind, that if the testator intended to vest the absolute property in his wife, he would have given it to her as he did other property to his sons. But he does not do so: when he comes to make provision for her, he expressly limits her interest to a life estate; and to hold that the absolute property passes in the chattels, is to do violence to the testator's language, and, we think, would contravene his clearly expressed intention.

The superadded right to dispose of the property at her death, at her own will and pleasure, we think, has not the effect of enlarging the precedent gift for life so as to vest the absolute property. Taking the whole will together, and bearing in mind the language employed by the testator when he would create or vest an absolute property, and the peculiar and guarded manner in which this bequest is expressed, we do not entertain a doubt that the testator meant what he said—to give his wife but a *life estate*, and to vest her with power and authority to dispose of the remainder; and, perhaps reposing with confidence upon the belief that she would execute the power of disposition, he makes no provision as to what shall be done with the remainder in default of appointment. In that event, it goes back to his personal representatives, to be administered as in case of intestacy.

The authorities, both English and American, seem generally agreed in the position, that an *express estate for life*, given by will, negatives the intention to give the absolute property, and converts words conferring a right of disposition into words of mere power. See the authorities, collated with much industry, upon the briefs of the learned counsel.

The case of Randall v. Shrader, 20 Ala. 338, which arose upon an ante-nuptial contract, was a correct decision; for the husband, by the contract, effectually excluded his marital rights from attaching to the property. True, the reasoning puts the decision upon another ground, and this would seem to conflict with the views above expressed, unless a distinction can be taken between the construction of the clause author-

izing the disposition of the property by the tenant for life, when employed in a will and in a deed. I shall not stop to inquire whether such distinction exists, nor whether the reasoning of that case can be supported. As we have already said, an almost unbroken current of authority, both English and American, as well as the principal text-writers upon this subject, have settled that words of disposition thus superadded, after an express limitation of a life estate, merely confer a power, and not property. Their effect is not, therefore, to enlarge by implication the previous estate; but, upon the death of the life tenant, and in default of appointment, a *quasi* reversion results to the representatives of the testator, or it falls into the residuum, according as the will may direct.

After a careful examination of all the authorities cited, and many which are not found on the briefs, we feel constrained to hold, that the decree of the chancellor is erroneous, and his decree must therefore be reversed, and the cause remanded.

CHAMBERLAIN & CO. *vs.* MASTERSON.

1. As to the distinction between guests and boarders at a hotel, and the liability of the landlord to each for the loss of goods.
2. If a boarder at a hotel fails to take such care of his watch as a person of ordinary prudence should take, the landlord will not be responsible for its loss.
3. On the request of the jury for further instructions, the presiding judge said, "I perceive from your questions that your minds have been misled by a case read by defendant's counsel;" and then stated to them, "that they should receive the law only from the court,—that counsel often read books to the jury to explain themselves more clearly and forcibly, but that they must not receive them as law, except so far as sanctioned by the court": *Held*, that there was no error in these instructions.
4. The refusal of the court to allow counsel, after the argument has been closed and the cause submitted to the jury, to explain a distinction applicable to the case, is not revisable on error: such matters properly belong to the conduct of the cause, and are entrusted to the discretion of the presiding judge.
5. It is error to instruct the jury, "that the main charge was to be with them the controlling part of the charge."

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by Hugh Masterson against Chamberlain & Co., to recover "one hundred dollars damages for the value of a gold watch, chain and key, stolen from the room occupied by plaintiff, as the guest or boarder of defendants, at the 'Battle House', then a public inn of Mobile; the said defendants then and there being the lessees and proprietors of said house; and the said watch having been stolen by one of the servants of said proprietors of said house between the tenth and twenty-fifth of the month of ——, 1858."

Other counts were added to the complaint, "by order of the court", in one of which it is averred, that the watch was lost by plaintiff from a room which he occupied at the Battle House, then and there a public inn, of which defendants were at the time lessees and proprietors, and the plaintiff their guest; in the second, that the watch was lost by plaintiff, without any fault or negligence on his part, from a room which he occupied as a guest at the Battle House, a public inn of which defendants were the owners; and in the third, that the watch was stolen from the room occupied by plaintiff in the Battle House, a public inn of which defendants were lessees and proprietors, and that it was stolen by one of the servants of said house then in the employment of said lessees and proprietors.

To the first count in the amended complaint the defendants pleaded, "that the Battle House was not a public inn, and that no watch was lost as charged"; and to the second and third counts they took issue, in short by consent.

On the trial, as appears from the bill of exceptions, "there was evidence tending to show that plaintiff was a guest at the Battle House, an inn or hotel kept by defendants, as also to show that he was a boarder; that his watch which he wore was taken from his room in the Battle House; that the room was attended to solely by the servants of the hotel, one of whom daily visited the room for the purpose of cleaning it; and that this servant kept a key to unlock this as well as many other rooms on the same floor."

"The court charged in full and at length on the liability of

innkeepers and hotel-keepers to guests and boarders, and the duties of guests and boarders; and among other charges, that if they believed that the watch was taken from plaintiff's room in the hotel, and was taken or stolen by the defendants, or by the servants employed by them in the house, or lost through the negligence of said servants, without any negligence on the part of plaintiff, then the defendants were liable to plaintiff, if he was either a guest or a boarder."

The defendants excepted to this charge, and requested in writing the following: "That if the jury believe that the defendants used ordinary care in regard to the property of the plaintiff, and they find the plaintiff to have been a boarder, the defendants are not liable; also, that if the jury believe Masterson was a guest at the Battle House, and that he was negligent, he cannot recover"; which charges the court gave.

"On the next morning, the jury came in, and requested some explanations in reference to the two last charges given by the court at the request of the defendants; in reply to which the court declined to say anything more than had already been said, except that the main charge was to be with them the controlling part of the charge; to which defendants excepted.

"After a time, the jury came in again, to ask further questions; in reply to which the judge asked them, if they referred to a case which defendants' counsel had read in his argument from one of the English Reports. Their foreman said, 'Yes'; and the judge then said, 'I perceive from the questions that your minds have been misled by the case that was read', and then stated to them, that they should receive the law only from the court; that the counsel often read books to the jury to explain themselves more plainly and forcibly, but that they must not receive them as law, only so far as they were sanctioned by the court; to which defendants excepted.

"The jury then retired, and shortly afterwards sent a slip of paper by the sheriff to the judge, on which was written, 'Question by one of the jurors: If the jury think that Masterson was a boarder, are the defendants liable as though he was guest?' which the court read aloud, and, the defendants' counsel being in court, called his attention to it, and then sent for the jury, and repeated to them what had been said to them

in the main charge of the court; and in answer to a question by one of the jury, as to what was the test of Masterson's negligence, the court asked them, if they had come to any conclusion as to the fact whether Masterson was a guest or a boarder. The foreman answered, that they found that Masterson was a boarder, and that the defendants were innkeepers. The court then charged the jury, that if Masterson took such care as a reasonable and prudent man would take of his property, he would not be guilty of negligence, and that if he did not take such care he would be negligent; and that if he did take such care of his watch as a reasonable and prudent man would take of his property, and the property was taken or stolen by the servants of the defendants employed in the house, or lost through their negligence, the plaintiff was entitled to recover; to which charge the defendants excepted.

"The defendants' counsel then began to explain to the court the difference between a guest and a boarder, but the court declined to hear him, on the ground that the other counsel was not present; to which he excepted."

The appellants now assign for error—

"1. The charge of the court making an innkeeper responsible for the loss of goods of his guest stolen by his servants.

"2. The charge making an innkeeper responsible for loss of goods of a boarder stolen by a servant.

"3. Error in the charges generally.

"4. Error generally in its *colloquiums* with the jury, and its refusals to charge as requested."

CHAS. P. ROBINSON, for the appellants;

The rule of law in the English courts, as well as of most of the courts of the United States, is, that "an innkeeper is responsible for losses happening to goods of travellers becoming his guests, except such as happen from the act of God, public enemies, or by the conduct of the guest himself, his servant, or the companion he brings with him."—Mason v. Thompson, 9 Pick. 280; Calye's case, 8 Co. 32; Smith's Lead. Cas., vol. 1, p. 266. But in deciding upon a case for the first time in this court, it seems proper to consider the origin, causes, and propriety of this rule, and whether they are such as require our courts to recognize the same rigorous rule in all its extent,

or whether, at least, it should be narrowed to its strictest limits.

In the earlier and ruder times of England, we readily find the cause and origin of the rule, and discover its justness. There was then but little general communication between the people of different sections and districts; the means and the habit of frequent intercourse, and the rapid circulation of trade and ideas, had not removed the wide differences that existed in the sympathy, knowledge, and feelings of distinct neighborhoods; the town was at a great remove from the country, and an inhabitant of one village felt as a stranger when business or pleasure called him into another; even an expedition to a neighboring fair or market was clothed with something of the terrors of a pilgrimage to unknown countries, and a sense of insecurity accompanied every act of traveling. Traveling, too, had not only its imaginary, but its real terrors: the roads were infested with robbers, thieves, and outlaws; it was in the power of any one, unlicensed, to become an innkeeper; and the comparative rudeness and lawlessness of the times invited unworthy persons to this calling, to abuse the confidence which travelers were compelled to repose in them. The police power of those times had nothing of the sufficiency for the detection of crimes that now belongs to it. It was this weakness that made the hundred responsible wherein a man was robbed, unless upon hue and cry the thief was taken; and in this same weakness of the police power,—in the imaginary as well as real dangers then attached to traveling, in the general want of respectability in the calling of innkeepers, and in the temptation to collude with thieves and robbers to plunder unprotected travelers, we find the true and sufficient origin of this rigorous rule of the liability of innkeepers for "the loss of the goods of travelers becoming their guests."

But hardly one of these grounds remains now, in this age and country, to uphold the rule. A common language, common ideas, common laws, the habit of traveling, equal knowledge, and an active intelligence, have disarmed traveling of most of its terrors, both real and imaginary, and clothed the traveler with a citizenship wherever his journey leads him. The landlord of the present day, instead of being low in the scale of respectability, and in a position to invite unworthy

suspicions, is always—whether he swings his sign by the road-side, or holds his justice's court in a village tavern, or presides amid the elegancies and splendors of a fashionable hotel—the frank, honest, intelligent, and hospitable gentleman, whose interests all lie upon the side of watchful honesty in regard to the person and goods of his guests. No apology for the rigor of the rule can now be found, as in early times, in the weakness of the police power: the laws, and an active, organized police, are far more adequate now than then for the detection and punishment of crimes. To this power belongs the duty: if it is inadequate, let it be improved and strengthened. It is as unworthy and unjust to hold the respectable innkeeper responsible for the crimes of others, to which his exposed situation may make him a victim, as to re-enact upon the innocent inhabitants of a hundred the ancient penalty for the robberies and felonies committed within its limits. It is a relic of half-civilized times and imperfect government, which finds no support in the present well-ordered condition of society and the efficiency of government. If, then, the reasons of the rule so entirely fail, why should not the rule cease with them?

It is begging the question to say, that "there is a confidence reposed in the innkeeper that he will provide honest servants, and that his negligence in this respect is a kind of implied consent to the robbery."—1 Black. Com. 430. What is the business of an innkeeper, but an ordinary business—a necessary calling in the economy of society, distinguished by no peculiar privileges or emoluments? Why should it be loaded with so onerous a burden? In it, care and attention are bestowed upon the persons and goods of guests, in consideration of a price paid, and honesty and fidelity are required, as in cases of other ordinary paid bailees for service or hire, whom yet it was never thought to charge, except upon proof of negligence. What greater facilities have they, or what greater inducements, to abuse the trust reposed in them, than the warehouse-man to whose sole custody untold thousands are committed, and who, while bound to diligence and fidelity, is exonerated from liability for the embezzlement of his store-keepers or servants?—1 Stew. 284; 13 Ala. 587; 4 Gill 406; 9 Wend. 268. And where, in the present condition of society

and the nature of the business, do we find any ground for charging them for the criminal conduct of their servants?—Story on Agency, § 456.

But, however the law may be held as to the responsibility of innkeepers for the loss of goods "of *travelers* becoming their *guests*", the rule was early held inapplicable to *boarders*, and a distinction was early recognized between a guest and a boarder. A guest was a traveler or wayfarer; but a person who came upon a special contract to board or sojourn at an inn, was not in law a guest, but a boarder.—Bacon's Abr., tit. "Inns", c. 5; Story on Bailments, § 477; Comyn's Digest, tit. "Action on the case for negligence", (B) 12. The same liability is not incurred in regard to the goods of boarders as to the goods of wayfarers: to give a boarder a remedy against an innkeeper, the latter must have been guilty of culpable negligence.—Authorities *supra*; Manning v. Wells, 9 Humph. 746; Parsons on Cont., p. 628. The rigor of the general rule, and its inapplicability to the times, should incline the courts to the recognition of this distinction.

The court erred in telling the jury that they were misled by a case read by defendants' counsel. The court is to decide the law, and not the case. It required a participation in the deliberations of the jury, to determine what was operating upon their minds, and enable the court thus to address them; and to tell them they were misled, without showing them wherein, was calculated to confuse them.

Wm. Boyles, *contra:*

The evidence tends to prove that the watch was stolen by one of the servants of the hotel, or lost by his negligence; no other person having access to the room than the servant who was provided with a skeleton key, which was kept for the purpose of opening the door during Masterson's absence. The landlord is responsible for the dishonest or negligent acts of his servants. Masters, also, are answerable for injuries occasioned by the wrongs and negligence of their servants, if committed in the exercise of the functions in which the servants are employed by their masters, even when the latter have no power to prevent them, and they are committed in their absence. This rule was established to make masters

careful in the choice of those whom they employ. Innkeepers are held responsible to as strict an extent as common bailees, and the principle was taken from the Roman law.—Story on Bailm., §§ 470, 471; Story on Agency, p. 637; 2 Kent's Com. 592; Walker v. Bolling, 22 Ala. 294.

The case of Manning v. Wells, 9 Humph. 746, which is cited by appellant's counsel, has no application to this case, as will be seen by reference to the facts.

GOLDTHWAITE, J.—The law held the innkeeper responsible to travelers who became his guests, for all losses *infra hospitium*, in every case, unless he proved that it was not owing to any default in him or his servants (Calye's case, 8 Co. 32); and some of the cases go further, and hold him liable for the acts of other guests.—Jones on Bailm. 94; Story on Bailm., § 470; Shaw v. Berry, 31 Maine 478. But there is a distinction between the liability of innkeepers towards guests and boarders, which was taken at an early day.—Calye's case, *supra*; Bacon's Abr., "Inns and Innkeepers", c. 5; Story on Bailm. (4th ed.) § 477 (3). If the goods lost belong to a boarder, in order to charge the innkeeper, he would be required to show that the loss was owing to the failure on his part to discharge the duties which his situation as boarding-house-keeper, or the special contract with the other party, imposed on him; and these duties must be measured by the analogies of the law applicable to other species of bailments. The hotel-keeper employs the servants to attend to the rooms, and his boarders have a right to expect that he will employ those who are honest; and if he fails to do so, and a loss is thereby occasioned, without negligence on the other side, he is held responsible, precisely on the same principle that a steamboat owner is, if an injury is sustained by the failure to employ a skilful pilot, or a careful engineer, or a competent captain.—Walker v. Bolling, 22 Ala. All bailees are liable to third persons for the acts of their agents or servants, done in the course of their employment. We do not mean to say, that it is not incumbent on the boarder to use that degree of care which ordinary prudence requires. The guest who, after exposing bank notes which he had in a box in the presence of many persons, left it in the commercial room, was held guilty

of gross negligence (Armstead v. White, 6 Eng. Law and Eq. 349); and if a boarder leaves money, or valuables, open and exposed in his room during his absence, it would be doubtful whether this would not be such negligence on his part as would prevent a recovery if they were stolen by a servant of the house. Neither guests nor boarders should tempt persons who occupy the situation of servants about hotels, in this way; and if the property was stolen under such circumstances, even by a servant of the house, we are strongly inclined to the opinion, that the keeper would not be liable. Here, however, no question of this kind arises, as the record fails to show any negligence on the part of the boarder; and although it is to be inferred from the charge given by the judge, as to what constituted negligence, that the question was raised, there was no error in the charge upon that point, which was, in effect, that if the boarder did not take such care of his watch as a person of ordinary prudence should, the landlord would not be liable.

Neither was there any error in what was said by the court to the jury, in relation to their being misled by the case read by the counsel for the defendants on the trial below. *Non constat* that it laid down the law correctly; but whether it did or not, we see no impropriety in the judge instructing the jury that they were not to receive it as law further than was warranted by the charge of the court. If the case read was regarded by the counsel as a correct exposition of the law, and applicable to the case on trial, he might properly have requested a charge which asserted the same legal proposition; but failing to do this, we cannot say there was any error in the action of the court in this respect.

So, also, as to the refusal of the judge, after the argument was closed and the cause submitted to the jury, to allow the counsel to explain the distinction between a boarder and a guest. These are matters properly belonging to the conduct of the cause, which are entrusted very properly to the discretion of the judge trying the cause, and are not revisable here.

But in instructing the jury that the main charge was to be with them the controlling charge, we think the court erred. When a charge is requested, which has not been given, is not abstract, and asserts a correct legal proposition, the party has

the right to demand that it should be given, without any qualification. We do not mean to say, that after giving it, the court may not prevent its undue effect by presenting the law applicable to the evidence on the other side, or any portion of it. It is frequently necessary, to prevent injustice, and to enable the jury to comprehend clearly the law applicable to the case, that a legal principle which governs it in one aspect should be presented to the jury in juxta-position with the law upon the facts in a different aspect; and every one who has practiced before juries will understand that this course is frequently necessary to prevent one side from obtaining an undue advantage over the other. But it might entirely destroy the effect of the charge given, if, after giving it, the jury were told that they must be governed by the main charge; and such were, in effect, the instructions given by the court. We can imagine no case in which such a charge would not have a tendency to mislead the jury.

For this error, the judgment is reversed, and the cause remanded.

HARRIS *vs.* HILLMAN.

1. The distinctions between the actions of detinue and trover are carefully preserved in the Code, and an amendment of the complaint which would convert an action of detinue into an action of trover cannot be allowed.—Code, § 2403.
2. In detinue for a slave, a recovery cannot be had against a purchaser at sheriff's sale, who, without notice that plaintiff intended to assert any right to the slave, parted with the possession under a contract of hiring before the suit was commenced.

APPEAL from the Circuit Court of Franklin.

Tried before the Hon. THOMAS A. WALKER.

DETINUE (under the Code) by John W. Harris against Joseph Hillman, for a slave named Burley; plea, not guilty. The plaintiff claimed under a deed of trust executed to him,

as trustee, by one F. O. H. White, dated March 18, 1844, and duly recorded in Franklin county, to secure a debt due to one Oscar H. Rolf; and the defendant claimed as purchaser at sheriff's sale, under an execution which was issued on a judgment in favor of Wiley, Banks & Co. against said White, which was rendered in March, 1852.

"The plaintiff proved, that he, as trustee, had advertised the negro to be sold for the payment of the debts secured by the deed, on the very day the execution was levied on him. At this stage of the trial, the defendant introduced a witness, who testified, that he (witness) was in possession of the slave at the time the suit was instituted, having hired him from the defendant, soon after his purchase of him, for the remainder of that year. The plaintiff's attorney then moved the court for permission so to amend the complaint that it might be for damages for the conversion of the negro by the defendant, instead of a recovery of the negro himself, and insisted upon this right under the Code of Alabama; but the court overruled the motion to amend the complaint, and the plaintiff excepted.

"The court then charged the jury, that the plaintiff could not recover in this suit, being an action of detinue, if they were satisfied from the evidence that the negro was not in defendant's possession at the time the suit was instituted, but had been hired out by him for the remainder of that year to another person, in whose possession the negro was; and to this charge, also, the plaintiff excepted, and took a non-suit."

These two rulings of the court are now assigned for error.

JNO. A. NOOE, for the appellant:

1. The court should have allowed the amendment of the complaint. The defect, (if, indeed, there was any defect at all) was one of form. The object of the suit was, to recover the negro, or his value; and the true question in the case was, who had the better title, the plaintiff as trustee under the deed, or the defendant under his purchase at sheriff's sale. It was immaterial to both parties by what form of complaint their respective rights were determined—whether by an action for the recovery of the slave, or for damages for his conversion. A judgment against the defendant in this action

would have been satisfied, if the negro was not in his possession to deliver to the sheriff, by paying his value. It is a mere technicality that requires the defendant in detinue to be in the actual possession of the slave at the commencement of the suit; and it is not required where he wrongfully got the possession himself, or wrongfully parted with it. The amendment of the complaint would not have taken the defendant by surprise, and would not have done him any injustice; his rights would not have been at all affected, and he would have relied on the same evidence to sustain his title in both cases. Code, §§ 2402, 2403.

2. The charge of the court was erroneous. The case of Walker v. Fenner, 20 Ala. 192, on which it was based, is not authority since the adoption of the Code, which declares (§ 2402) that "all causes must be tried according to the rights of the parties, without regard to forms." It was certainly the intention of the Legislature, in the adoption of the Code, to abolish all technicalities and forms, as far as possible, so that all causes might be determined according to the rights of the parties. But, even if Walker v. Fenner is still to be regarded as a correct decision, the principle upon which it was decided is not at all applicable to this case. There is a marked distinction between the two cases: Walker was never in possession of the negro after Fenner became entitled to it, but had parted with the possession under a contract of hiring, as he had a perfect right to do, owning a life estate which had not terminated at the time of hiring; but the defendant in this case, knowing that plaintiff claimed title to the negro under his recorded deed, wrongfully acquired the possession in the first instance, and wrongfully parted with it; and therefore, on the authority of what is said in Walker v. Fenner, he was liable in detinue, and could not deprive plaintiff of his right to that action by hiring out the negro to another.—Hunter v. Sevier, 7 Yerg. 134; Haley v. Rowan, 5 Humph. 301; 1 Wash. 12; 1 Hayw. 12; 1 Chitty's Pl. 120; and other authorities cited in R. W. Walker's brief in Walker v. Fenner, *supra*.

Wm. Cooper, *contra*, contended, 1st, that the Code does not authorize an amendment which would change the nature

of the action, any more than the previous statutes authorizing amendments in matters of form.—Aiken's Digest, p. 265, § 44; Clay's Digest, p. 321, § 50.

2. That the charge of the court was fully sustained by the case of Walker v. Fenner, 20 Ala. 192.

RICE, J.—The well-known boundaries of the actions of detinue and trover, are distinctly marked, and carefully preserved in our Code. A form of complaint is therein laid down for each of these actions. The form for detinue is under the caption, "For the recovery of chattels in specie", which aptly expresses the peculiar object of that action. The form for trover is under the caption, "For the conversion of chattels", which indicates that conversion should continue to be, as it had ever been, the *gist* of that action.—Code, pp. 552, 554. The judgment in detinue is, that the plaintiff recover the chattels, if to be had, (but if not to be had, their value,) and damages for their detention. The judgment in trover is, that the plaintiff recover damages only. The evidence which will sustain detinue, will not, in many cases, sustain trover.

The present action is detinue. The complaint is in the very form given in the Code for that action, and is free from any defect. The Circuit Court had no power to allow the plaintiff to convert this complaint into a complaint in trover, and properly overruled his motion to that effect. The power of that court to allow amendments does not, and never did, extend so far as to allow such change in a declaration or complaint.—Herring v. Glisson, 2 Dev. Law R. 156.

It appears that the defendant was a purchaser at sheriff's sale in January, 1853, of the slave here sued for, and thus obtained the possession in a manner which appeared to be lawful, and that soon thereafter he hired the slave to another person for the remainder of the year 1853, without any notice that the plaintiff intended to assert any right to said slave, or to call in question the right of defendant acquired at said sheriff's sale; and that soon after he thus parted with the possession under said hiring, this action of detinue was commenced. Such parting with the possession under the contract of hiring, without notice as aforesaid, was not wrongful,

and the charge of the court is substantially correct, when construed in connection with the facts above stated. We do not, however, intend to decide, that if it had appeared that the defendant parted with the possession of the slave under said hiring with notice that the plaintiff intended to assert a right to the slave, or to call in question the right of defendant acquired at sheriff's sale, that such parting with the possession would, of itself, have exempted him from liability in this action of detinue.—Walker v. Fenner, 20 Ala. 192.

There is no error in the record, and the judgment is affirmed.

KENNEDY'S EX'R *vs.* DOE EX DEM. ROCHON'S HEIRS.

1. Evidence cannot be received in the appellate court to contradict the record in the primary court; nor will this court, on error, look to the American State Papers, as published under the authority of Congress, to show a mistake in the certified copy of a public document contained in the transcript.
2. The act of Congress of May 8, 1822, (3 U. S. Stat. 692, 700,) "confirming claims to lots in Mobile," &c., confirms only those claims "which, in the opinion of the commissioner, ought to be confirmed"; and the commissioner's report, on which the act is based, only recommends for confirmation, of all the claims embraced in register No. 11, "the claims to such lots as were inhabited and cultivated under the Spanish Government, or such as were built upon by permission of the Spanish authorities." Therefore a claim to a lot which was inhabited and cultivated by one of the claimant's ancestors while Mobile was under the dominion of Great Britain, though included in the commissioner's report, does not come within the provisions of the act of confirmation, when it is shown that the mansion-house, with all the improvements, was burned down during the siege of Mobile by the Spaniards in 1780, and there is no proof of any subsequent inhabitation or cultivation under Spain.

(This applies to the claims of the heirs of A. Rochon, numbered 74, 75 and 76, in the register (No. 11) of claims "founded on private conveyances, which have passed through the office of the commandant, but which are founded, as the claimant supposes, on grants lost by time or accident."—See Commissioner Crawford's Report, in 3d vol. Amer. State Papers, p. 32.)

3. The case of Doe *ex dem.* Farmer's Heirs v. Eslava, reported in 9th How. U. S. Rep. 421, in which a similar claim was held to be within the act of confirmation, cannot be regarded as a judicial determination of the point presented in this case, since no question was there raised as to the fact of confirmation.

ERROR from the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

EJECTMENT for a lot of land situated in the city of Mobile, and described as follows: "Beginning at the south-east corner or intersection of Conception and Government streets; containing one hundred and fifty-six feet front on said Government street, by a depth of forty feet, more or less, on Conception street; bounded north by Government street, east by the property of ———, and south by the property of the heirs of Rochon."

The action was commenced in June, 1849, and a trial was had in May, 1852, which resulted in a verdict for the plaintiffs. The plaintiffs claimed as heirs-at-law of Augustin Rochon, deceased, whose title, as they insisted, was confirmed by the act of Congress of May 8, 1822, "confirming claims to lots in the city of Mobile"; while the defendant, as the executor of Joshua Kennedy, deceased, derived title under a Spanish concession to Thomas Price in 1798, which was confirmed by the act of Congress of March 2, 1829, and a patent issued to Kennedy in 1837.

The defendant's bill of exceptions states, that "the plaintiffs gave in evidence duly certified transcripts from the land-office at St. Stephens, Ala., showing the application of said Rochon, the proceedings in the land-office, the report of Commissioner Crawford on the claim, and also the survey of said lot as certified; copies of all which documentary proofs of title are hereto annexed in schedule A, and made a part of this bill of exceptions." The several documents set out in the transcript are correctly and particularly described in the opinion of the court; but there is no "schedule A" in the record, and nothing by which these documents can be identified with those referred to in the bill of exceptions.

The bill of exceptions further states, that "the defendants gave in evidence a patent issued to Joshua Kennedy, in right of Thomas Price; also, the record of the proceedings in the land-office showing the applications for confirmation of said title of Price, maps, surveys, reports, &c., as set forth in schedule B, hereto annexed as a part of this bill of exceptions. The defendant gave in evidence, also, the mesne convey-

ances from Price to Joshua Kennedy; the death of Kennedy in 1838; his will, and the devise of the land to Hallett as his executor. The original Spanish concession, and the plat thereto attached, were also given in evidence; and it appeared in evidence, also, that the lot sued for was embraced within the said Price title, and within the portion covered by the first concession to Price." None of the documents here referred to as constituting the defendant's title are transcribed in the record, but there is an agreement of record, signed by the counsel of the respective parties, in these words:

"In this case it is agreed, that the record, plats, and documents constituting the Price title, with the certificates, plats, and evidences thereof, as found of record in the case of Doe *ex dem.* Hunt, Hogan, and others, against Hallett & Walker, reported in 7th Ala. Rep. 882, in this court, is made a part of this record, and may be referred to as part of it, with the reports thereof found in the public documents of the United States, (Amer. State Papers, tit. Public Lands, vols. 3 and 5,) the same being the Price title referred to in the bill of exceptions, and intended to be added to this record by consent, and now done."

The bill of exceptions states, also, that "it further appeared in evidence that the land sued for was fenced in by the United States, and taken possession of by its officers, at the time the Government took possession of Fort Charlotte, and it was held by the United States officers, enclosed as aforesaid, until about the time when the Fort-Charlotte lots were sold; when this portion, and the lots around it, were thrown out, as not appertaining to the Fort-Charlotte lots. It was further proved, that Mr. Acre then set up some claim to it for the heirs of Rochon, and Mr. A. W. Gordon, claiming that he had made an agreement with Mr. Acre to purchase the rights he represented, entered upon the possession of the lot now sued for and the adjoining lots east and south of it; but that the lot now sued for was afterwards claimed by the heirs of one Espejo as belonging to them, and Mr. Gordon gave it up to them, and took possession of the other portions. The heirs of Espejo thus got it, enclosed it, and held it. Mr. Gordon held the other portions for some time, till they got into other hands by his deed; and finally, in 1837, the parties holding

the other portions of the Rochon claim (being the lot south of the lot sued for) purchased the title and claim of the heirs of Rochon, being for the part shown in the plat south of the lot sued for, and exclusive of it. The heirs of Espejo remained in possession of the lot sued for, and Joshua Kennedy sued to obtain the possession from the tenant of Espejo; and it was surrendered by the heirs of Espejo to Hallett in 1842, upon his paying them certain sums paid to the corporation for making side-walks, &c., for which the corporation had given a title to said Espejo; and thus the said defendant obtained the possession. It appeared that Kennedy, and those under whom he claimed, had possession of the lands of the Price title in Spanish times, and before confirmation, but no actual possession of this part. There was no proof where the lot of (the name is illegible, but supposed to be *Le Fleaux*) was; nor was any evidence given to locate the lot of Rochon, other than the survey by the United States, and the claim by Acre as aforesaid, and the sale by them of the adjoining portions, and the assertion of claim in their conveyance to it, and by offers to sell it at public auction."

"Upon this evidence, the defendant asked the court to instruct the jury—

"1. That the patent to Kennedy, and the confirmation of title by the United States location and survey of the said lands conceded to Price, gave to said Kennedy and those claiming under him a good title to the land so patented.

"2. That the act of 1822, of itself, gave no vested title to Rochon or his heirs.

"3. That no title could, under said act, vest in said Rochon or his heirs, until a location of the lot so confirmed to them was made or approved by the officers of the land-office, ascertaining the location and boundaries of the lot.

"4. That the survey shown and approved by the surveyor-general was not, of itself, sufficient to locate the said lot, as against the defendant's location evidenced by the patent.

"5. That before the survey so shown could prevail over the patent of the defendant, it must be shown to have been adopted, sanctioned, or approved by the register and receiver of the land-office, and that no title could vest in the plaintiffs until such sanction was given by the land-officers.

"6. That the documentary title exhibited by the plaintiffs could not be sustained, because not in conformity with the requirements of the act of 1822, being for a quantity exceeding the limit of 7,200 square feet.

"7. That the claim of Rochon could not, under the act of 1822, be divided into more than one confirmation, so as to give more than 7,200 square feet to the claimants in the shape of two or more lots; and that if they had already obtained the double lot, they could not claim more under said act.

"8. That the record of confirmation was not sufficient evidence of title, the plaintiffs having produced no certificate of confirmation and no patent certificate.

The court refused these charges, and instructed the jury—

"That it was true that the title of the defendant, as shown by the patent, would, if taken by itself, give a good title to the grantees thereof; but that, as against the title shown by the plaintiffs, it would not: that the confirmation of the plaintiffs' title being in 1822, and prior in point of time to Kennedy's, it gave the better title; because, when the confirmation to Kennedy was made, it had no longer any title to grant, and because plaintiffs' title was within the exception of the patent to Kennedy."

"That the act of 1822 did vest a title in the heirs of Rochon to a lot, wherever such a one as described in the application could be found; and when so found, it attached to it, and the title related back to the date of the act."

"That if the lots described in the deed submitted to the commissioner can be ascertained by the jury from the evidence, and they comprehend the *locus in quo*, then the plaintiffs would be entitle to recover: that to ascertain the location of this lot, the survey of the United States officer was competent evidence, but it was not conclusive evidence against the defendants, and the latter might impeach or contradict it; and that if this survey offered by plaintiffs was the true location of the lot, then the title exhibited by plaintiffs to the lot was superior to that of defendant, and would entitle the former to recover."

The defendant excepted to the several charges given, and to the refusals to charge as requested; and he now assigns these rulings of the court for error.

GEO. N. STEWART and WM. G. JONES, for the appellant:

The whole question to be examined turns on the validity of Rochon's title, and not on that of Kennedy. Rochon's heirs, it is conceded, show no title either under Spain or Great Britain: their claim is on the bounty of the United States merely. They claimed that their ancestor had a possession under Great Britain, but they claimed no possession or title under Spain. The acts of Congress, under which these claims were presented before Commissioner Crawford, allowed every description of claim to be laid before him. He passed on them, and divided them into classes, in which shape he reported on them; and the Rochon claim falls within the class numbered 11, the list of which is headed "Register of claims to lands in the district east of Pearl river in Louisiana, founded on private conveyances which have passed through the office of the commandant, but founded, as the claimant supposes, on grants lost by time or accident."—American State Papers, vol. 3, p. 32. The act of May 8, 1822, acted upon all these different classes of cases; and a title by grant is now claimed by Rochon's heirs by the force and effect of the third section of that act, which disposes of that class of cases, and, as they say, vests a title in them by the law itself, without any further act being required to complete it. We deny that the act of 1822 does confirm this title to them at all, and insist that, consequently, they have no title.

To determine whether the Rochon claim was confirmed or not, we must carefully examine the act of 1822, and the report of Commissioner Crawford on that claim; and for further certainty we may look to the claim itself as presented, and the proof relied on to support it before the commissioner. It was on this claim and proof that the commissioner acted, and it was on his report that Congress acted.

The act of 1822 (§ 3) does confirm many claims where no title was produced; but they were confirmed in consideration of the possession which the parties had under Spain; and no claim was confirmed unless the commissioner had reported that, "*in his opinion*," it was entitled to confirmation. The language of the section is, "that all claims," &c., "which have passed through the office of the commandant, but founded, as the claimants allege, on grants lost by time or accident, *and*

which ought, in the opinion of the commissioner, to be confirmed, shall be confirmed," &c. The act, then, is conclusive on this point; and the commissioner's decision, that the claim is entitled to confirmation, is indispensable.

Let us now examine what the claim of Rochon's heirs was. Their petition to the commissioner is dated April 25, 1814; and by it they claim three lots of ground, by virtue of a grant lost by time or accident, made in favor of B. F. Fievre, and transferred to A. Rochon by bill of sale dated February 2, 1775. Next follows a copy of an English deed, from divers persons, to Augustin Rochon, of the above date, in the 15th year of the reign of Geo. III., for one double lot and one single lot. Next is a translated copy of a will, originally in French, made by Louise Fievre, dated July 6, 1805, and reciting that she was the widow of Rochon, and that she owned some lots—two with a house on Royal street, and five others in the environs of the fort—which she bought of different persons in the time of the French and English Government; and declaring that her children have already received the property of their father. We next find the depositions of two witnesses, Bart. Lorent and Wm. Mitchell, made the 21st April, 1814. Lorent deposes, that Mad. Rochon, at the time the Spaniards came to take the fort of Mobile, lived in her house built on her lots nigh the fort; that the English burned her house, with all her improvements; that he does not perfectly recollect the number of lots she possessed, but thinks there ought to be nearly five from the extent of them, as she had upon them a large yard, a large garden with fruit trees, and a park; that the lots were bounded on the north by the lots of the deceased John Baptiste Le Fleaux and the street, to the south by the common, and to the east and west by the streets, the lots traversing the square from west to east. Mitchell deposes, that when the Spanish came to take the fort of Mobile, in 1780, Mad. Rochon lived in her house built on the lots she had nigh the fort and facing the common; that during the siege of the fort the English put fire to her house, which was burnt with all the other improvements; that he does not perfectly recollect the quantity she possessed, but that she had on said lot a large court, a large garden with fruit trees, and a park; that these lots were bounded on the

north by the lot of the deceased John Baptiste Le Fleaux and the street, to the south by the common, and to the east and west by the streets, her lots traversing the square from east to west. This was all the evidence laid before the commissioner, and that on which he founded his report.

The commissioner made his report on the 20th October, 1814, and it was laid before Congress in 1816 by the commissioner of the General Land-Office, R. J. Meigs.—Amer. State Papers relating to the Public Lands, vol. 3, pp. 31, 32. In some of the registers the commissioner recommends the entire list of claims as in his opinion entitled to confirmation, and in others he reports the entire list as not entitled to be confirmed; but the list numbered 11, which comprehends this claim, does not in the heading profess to set forth his opinion. This list contains eighty-eight claims, and the commissioner sets out, in tabular form, the special facts ascertained by him in each case, which he deems material. The Rochon claim we find split up into three, each for one lot, numbered 74, 75 and 76, and as to them the facts found are as follows: "By whom claimed—Heirs of Rochon; Quantity claimed—Unknown; Where situated—Mobile; Inhabitation and cultivation—Inhabited and cultivated about 36 years ago." His report, at the bottom of the list, is, "That the claims to such lots as were inhabited and cultivated under the Spanish Government, or such as were built upon by permission of the Spanish authorities, ought to be confirmed." We must, therefore, to ascertain the effect of this report on each claim, apply these remarks to each case separately on the list; and by so doing, we will find the effect to be, that he reports seventy-one cases as in his opinion entitled to confirmation, and seventeen cases not so entitled, and among the latter is the case of Rochon. In every case, he reports, as was made his duty by the act of 1812 under which he was appointed, (Clarke's Land Laws, p. 608, § 5,) on the inhabitation and cultivation by the parties, and when; and in Rochon's case, he reports, not a possession under Spain, but, in effect, a possession "*about thirty-six years ago.*" It must be here noticed, that there is an error, or misprint, in the published copy of the commissioner's report, which makes it say "Inhabited and cultivated *about thirty-six years,*" instead of "*thirty-six years ago*"; the

certified copy of the record from the Land-Office shows the true report, and the evidence laid before the commissioner, which shows when the possession was, confirms it. The report being made in 1814, the period of the possession, "*thirty-six years ago*," carries us back to the year 1778, when, as history informs us, Mobile was a British possession. It was taken from England, by assault by the Spanish troops, in 1781, and became a province of Spain in 1783, by the treaty of peace between England and Spain.—See Pickett's History of Alabama. It is clear, therefore, that when the report shows a possession in 1778, none being pretended since that time, it cannot be taken as in the opinion of the commissioner entitled to confirmation, since he determines that only those who possessed under Spain, or those who built on land by Spanish authority, are so entitled.

It cannot be pretended that the commissioner's report meant anything else than we have shown. The report is the correct result of the proof laid before him; and there was no proof of any possession under Spain, and no pretence of any in the petition. How could the commissioner report, or intend to report, a possession under Spain, when none was proved, nor pretended? The title was confessedly a British one, if any ever existed. The commissioner well knew that Spain claimed forfeitures of such titles, and had the right to re-grant the lands; and hence his requirement of either a Spanish occupation or a concession by Spain. How can this claim be distinguished from No. 87 in the same list, where the report was, "Inhabited while the British possessed West Florida"? It cannot be pretended that the commissioner reported in favor of that claim; yet Rochon's is, in effect, precisely a similar case: in neither one of them was there a possession under Spain. We all know that, by the treaty between Spain and England, British subjects were entitled to a certain time to sell their possessions; and that, if they did not do so, their possessions were forfeited, and subject to be re-granted to others by Spain.—Doe *ex dem.* Farmer's Heirs v. Eslava, 11 Ala. 1028, (a case similar to this).

But we are not left to doubt on the question whether this is a confirmed title or not: it has been fully and expressly decided by this court in the case of Hall v. Root, 19 Ala. 392.

In that case, it was the claim of Daniel Johnson, (original claimant, John Lynder,) for 5,000 arpens; and the report of the commissioner was, "Formerly inhabited and cultivated by Lynder; the date of the bill of sale to Johnson altered." It did appear by that report that the land had been inhabited and cultivated, but the commissioner did not say when, nor that it was under Spain; and in that case, as in this, he said, that those claims to lands which were cultivated and inhabited under the Spanish Government were, in his opinion, entitled to confirmation. But this court said, "We cannot, without violence to the report, consider this one of the claims recommended for confirmation."—p. 395. That case was not so clear a one as ours, and a decision against us here could not be made without overruling that case; and yet that passage in the opinion is correct, and no one can doubt it. We insist, therefore, that this is a conclusive objection to the plaintiffs' action, and must defeat it, as the plaintiffs certainly have no confirmed title, and consequently no title whatever.

A. R. Manning, P. Walker, D. Chandler, and R. H. Smith, *contra*:

The point particularly insisted on for appellant is this: That the commissioner Crawford by his report recommended for confirmation the claims to such lots only "as were inhabited or cultivated under the Spanish Government, or such as were built upon by permission of the Spanish authorities; that the claim of Rochon's heirs did not come within this category; and that it was not therefore confirmed by section 3 of the act of 1822, confirming those claims "which ought in the opinion of the commissioner to be confirmed."

Supposing, for the present, that there was any reason for extending the bounty of the Government, or its justice, to claimants under one of the sovereigns which preceded it in its jurisdiction over the country about Mobile, rather than to the claimants under the others, and that it intended to do so; what was the opinion or report of the commissioner Crawford, in reference to the claims of the appellees, on which Congress acted?

We are seeking to get at the meaning of an act of Congress. For a right interpretation of it we must examine the reports

to which it refers in the body of it, and upon which it is predicated. It was enacted to quiet titles in favor of those who were supposed by Congress to be justly entitled to such relief against it. The claimants and the friends of each, in and out of Congress, observe the acts of that body, and the reports referred to therein; and if, according to these solemn and open documents, their claims respectively are recognized and confirmed, of course, they rest content. The Government thereby says to them, in effect: Trouble yourselves no more; though there be other evidence which you may procure, before witnesses die, or archives shall be removed or destroyed, make no efforts to secure and save such evidence; here is the confirmation of your title. To suffer such confirmation to be defeated, twenty or fifty years afterwards, by an allegation that a public officer had made a mistake in the report upon which Congress acted, would be but to set a trap to divest innocent and meritorious citizens of what might be their just rights.

What, then, was the report on which Congress acted in reference to this claim, and which became a part of the statute by express reference in it? Appellant's counsel says, it was one in which the commissioner, in October, 1814, reported that the lot claimed was "inhabited and cultivated about thirty-six years ago", at which time the Spanish King had no dominion in the country. We say, for the appellees, this is not so. True, the register of the land-office at St. Stephens, in a paper from that office, certifies to a transcript of a writing purporting to be Crawford's report, in which the word "ago" appears. But this is not the report itself, upon which Congress acted, to which it referred, and to which the claimants and others must have looked for the ascertainment of the expressed "opinion" of the commissioner. That report the commissioner was at first required (by the act of April 25th, 1812, § 7, 2 U. S. Stat. at Large 713) to make to the Secretary of the Treasury; but afterwards, and before Crawford reported, he was required to make it to the Commissioner of the General Land-Office. This Crawford did; and that officer (R. J. Meigs) in 1816, communicated the report to Congress. It is found as public document "No. 234, 14th Congress, 1st session, (from pages 6 to 36,) in the 3d volume of "American State Papers" relating to public lands,—declared in the title-

page to be "Documents Legislative and Executive of the Congress of the United States"; "Selected and edited under the authority of Congress, by Walter Lowrie, Secretary of the Senate, and Walter S. Franklin, Clerk of the House of Representatives." On page 36 is the report of the claim of Rochon's heirs. Mr. Stewart, in his printed argument, (p. 5,) refers to the same, though he sinks the most important part of it in a note at the bottom of his page.

By this report, then, upon which Congress acted, (and which by adoption or express reference became a part of its statute,) the commissioner Crawford reported that the lot claimed had been "inhabited and cultivated about thirty-six years." And as, during the greater part of the thirty-six years before 1814, Mobile was under Spanish rule, this claim came plainly and expressly within the recommendation of the commissioner. Whether there was an error or not in the report, it is needless to inquire. If there were, and the plaintiffs' own evidence show it, still it does not defeat the confirmation. The affidavits, writings, and other evidence left by the commissioner in the local land-offices behind, are not the things to which Congress referred as expressing "the opinion" of the commissioner, but his report communicated to it; and their effect upon the title does not depend upon the side which introduces them. These papers, though, themselves show that the premises were occupied when the Spaniards were in possession of the city of Mobile, and actually taking Fort Charlotte; and that the Spaniards did not disturb this possession, but the English troops.

Little room is there for doubt that if the title of the heirs of Rochon were not considered as settled by the act of 1822, Congress could have been constrained, by the representations that would have been made to it, to confirm it before or in the act by which it gratuitously relinquished the title of the United States in favor of the holders of the enormous Price claim (made to absorb upwards of 900 acres in the city of Mobile), which Commissioner Crawford reported in 1817 as a fraudulent one (see 3 Amer. State Papers, *supra*, p. 11), and which has been made to swallow up many others of far more merit: for the proof shows that the premises claimed by Rochon's heirs had been a long time occupied, improved and

claimed as private property, with a mansion, a park and an orchard upon it, right under the walls almost of old Fort Charlotte, the very seat of the power of the monarchs of France, England, and Spain, who successively had rule in Mobile. So long, indeed, had these lots been private property, that in the act of sale thereof from Bellaque, Fievre, and others, to A. Rochon in 1775, (twenty-three years before the initiation of the vast Price claim,) a house on them is spoken of as "almost rotten and falling to the ground"; and in 1780, the mansion of Madame Rochon (not the garden and orchard, which were doubtless still used afterwards) was destroyed by the English authorities, the better to enable them to defend the fort against the assault of the Spanish troops, who at that time captured it: all the city except the fort being at the time in possession of the Spaniards.

Doubtless the claimants supposed that this proof, showing how long the premises claimed had been recognized and notoriously used as private property, and that the house on it had been destroyed under such circumstances, was the strongest case they could present to a Government which had succeeded the English and Spanish authorities in their rights, and in whose action it was a fundamental principle that private property could not be taken for public use without due compensation therefor: and if they had learned from the report of the commissioner and the act of Congress, that their claim was not intended to be confirmed, additional proof could have been had of their right.

But suppose the report of the commissioner, upon which Congress acted, had contained the words "inhabited and cultivated *about* thirty-six years *ago*"; we may inquire whether he did not still intend to recommend this claim for confirmation. The officers of the land-office at Jackson, Mississippi—who were authorized by the act of 1822 to issue their warrants for the survey of the lots to which the titles were confirmed—evidently so understood the commissioner: for, in the very next year (1823) after the enactment of the law, they issued their warrants accordingly.

Next, the act authorizing the appointment of the commissioner (2 U. S. Stat. at L. 713) requires him to make "abstracts from the records of the claims, in which the claims

shall be arranged into classes according to their respective merits and other circumstances whereby they may be diversified"; and from the fourth section (p. 715) it appears that Congress did not consider titles derived from English or French authority any less worthy of favor than Spanish titles.

Again; the abstract containing this claim is headed "Register of claims", &c., "founded on private conveyances, which have passed through the office of the commandant", who was a Spanish official: from which we must infer that the commissioner intended to certify all these claims as having the sanction of the Spanish authorities, and all therefore entitled to confirmation, except such as he expressly reports (as he does of several) as never having been inhabited or cultivated at all, or not until after the country passed to the United States, by the treaty of 1803 with France.

This conclusion is strengthened by the fact, that in this abstract he does not in any line of it refer to the nationality, whether English, French, or Spanish, of the original grants, or inquire into it—they being lost; and knowing that the Spanish authorities had long and immediately preceded the United States in the occupation of the country, he probably never adverted to the fact, that thirty-six years before 1814 would go back to the last years of the English occupation and the first of the Spanish. The word "about", in the report, has a similar significance—"about thirty-six years", or "about thirty-six years ago."

There is not a particle of evidence justifying the suggestion that the Rochons or Fievres were British subjects, who might forfeit their rights of property under the treaty between Great Britain and Spain: and their names, the language they use in their wills, &c., clearly indicate that, if not Spanish subjects, they belonged to the class of French settlers, derived from the country with which Spain was at that period in close alliance against England.

NOTE BY REPORTER.—The arguments of the respective counsel on numerous other points presented by the record, which are not noticed in the opinion, are omitted for want of space, and because they are deemed unnecessary to a correct understanding of the points decided.

CHILTON, C. J.—As every plaintiff in ejectment must recover, if at all, upon the strength of his own title, our first inquiry will be, whether the heirs of Rochon exhibited such title in the court below as would support their action. If they failed to do so, and their failure results from an incurable defect, affirmatively shown by them in the proof which they submitted, it were needless for us to go further and discuss the other points raised in the argument.

They exhibited in the court below their petition to the commissioner, under date the 25th April, 1814, by which they claim three lots of ground in virtue of a grant, lost by time or accident, in favor of B. F. Fievre and transferred to A. Rochon by bill of sale dated 2d February, A. D. 1775. Then a deed from Frances Fievre, Martha Dubroca, and Louise A. Rochon, to Augustin Rochon, dated 2d February, 1775, for a double lot and a single lot of ground, situate in the town of Mobile, bounded by streets and the lots of coterminous proprietors as therein shown. Next a will, made by Louise Fievre, dated 6th July, 1805, reciting that she was the widow of A. Rochon, and that she owned certain lots,—two with a house on Royal street, and five others in the environs of the fort, which she purchased of different persons while the French and English governments held possession. In this will she also declares, that her children had already received the property of their father, agreeably to the writings which had been made at different epochs. Then follow two affidavits, one of Bartholomew Lorent, the other of William Mitchell, showing Madam Rochon's possession during the British times, and the destruction of her house and improvements pending the siege by the Spanish authorities in 1780.

The foregoing was the evidence laid before the commissioner Crawford, as shown by the certified transcript from the land-office, introduced by the plaintiffs below. In the same transcript is set forth the report of the commissioner upon the claims as above propounded before him. In this report, it is stated by the commissioner that the lots were "inhabited and cultivated about thirty-six years ago." These, with two surveys by Willis Roberts, deputy surveyor, and transcripts from the registers of certificates and locations, constitute the documentary evidence adduced by the plaintiffs.

1. The first prominent objection urged by the counsel for Mr. Hallett against Rochon's title, is, that it was never confirmed by the act of Congress of 8th May, 1822, (3 Statutes at Large of the U. States, pp. 699–700). Let us see whether this objection can be sustained.

The act provides, "That all claims to lots in the town aforesaid (Mobile), reported as aforesaid, and contained in the reports of the commissioner, or of the register and receiver acting as commissioners, founded on private conveyances, which have passed through the office of the commandant, or other evidence, but founded, as the claimants allege, on grants lost by time and accident, and which ought, in the opinion of the commissioner, to be confirmed, shall be confirmed, in the same manner as if the titles were in existence: *provided*, that in all such claims, where the quantity claimed is not ascertained, no one claim shall be confirmed for a quantity exceeding seven thousand two hundred square feet." 3 Statutes at Large, 699-700.

Among the reports referred to by this act of Congress, is one by Commissioner Crawford, embracing a class of claims, numbered 11, the list of which is thus headed:—"Register of claims to land in the district east of Pearl river in Louisiana, founded on private conveyances which passed through the office of the commandant, but founded, as the claimant supposes, on grants lost by time or accident." This schedule embraces eighty-eight claims, and comprehends the claims of the heirs of Rochon. It is made out in the following form:—

Numbers.	By whom claimed.	Original claimant.	Quantity claimed in feet. Front.	Depth.	Area.	Where situate.	Cultivation and inhabitation.
64	A. Duplantier,	Sim. Andry,	210	156	32760	Mobile,	From 1805 to Nov. 1813.
65	M. B. Stewart,	J. F. Franier,	60	120	7200	"	Not inhabited nor cultivated.
*	*	*	*	*	*	*	*
74	Heirs of A. Rochon,	Fievre,	Unknown,			"	Inhabited & cultivated about thirty-six years ago.
75	Same,	Same,	Do.	Do.	Do.	"	Do.
76	Same,	Same,	Do.	Do.	Do.	"	Do.

The schedule is signed by the commissioner, and is accompanied by the following:—"Remarks.—Though the original grants, upon which the preceding claims are founded, have been lost, yet it is conceived that the claims to such lots as

were inhabited and cultivated under the Spanish government, or such as were built upon by permission of the Spanish authorities, ought to be confirmed."—(Signed) "William Crawford, Commissioner."

We are referred by the counsel of the appellees to the 3d volume of the American State Papers, page 32, containing the report of Commissioner Crawford upon these and other claims, an extract from which report is set out in the bill of exceptions, being certified from the land-office, and which corresponds, as respects these claims, with the facts set forth in the above tabular statement.

In the American State Papers, however, the word "ago" is omitted, and if we are to be governed by the printed report, as contained in this volume, it is very clear, the claim of the heirs of Rochon must be regarded as confirmed; for it appears by it, that the lots were inhabited and cultivated from a period anterior to the conquest of Mobile by the Spanish from the British Government down to the period of the making of his report by the commissioner. The printed report, as contained in this volume reads "Inhabited and cultivated about thirty-six years." We are, however, unable to perceive upon what principle we can receive evidence in this court to contradict the record in the court below, or to show a variance between the transcript of the report introduced by Rochon's heirs in the primary court as a part of their evidence of title, and the report as contained in the State Papers. We must intend, that the act of 8th May, 1822, was passed with reference to the original report made by Mr. Crawford, and not to the printed copy of it as contained in the American State Papers. Indeed, the act of Congress could not have been based upon the report as printed in this volume, for it was not printed until 1834, about twelve years after the act was passed. Although these State Papers, having been published by authority of Congress, are evidence of high grade, yet we apprehend that it cannot be successfully maintained that the rights of parties in respect of private claims can be affected by the misprints which they may contain. In our opinion, the misprint may be shown by reference to the original report on file in the government archives. It is, however, unnecessary to dwell upon this

point, as it was not raised in the court below. The plaintiffs, as we have said, by the certified copy from the land-office, showed to the court and jury upon the trial that the commissioner's report was, that the land was "cultivated and inhabited about thirty-six years ago"—that is, about thirty-six years before the making of his report; and as this corresponds fully with the evidence accompanying his report, we doubt not it is correct, and that the word "*ago*" is omitted through mistake in the printed report. We are inclined to the opinion, that the certified copy by the proper custodian of the report, as originally made by the commissioner, would control, and should be allowed to correct the printed report. See Marshall v. The State, 14 Ala. 411; also, 2 Salk. 566. But it is unnecessary now to decide that question.

Assuming the commissioner's report to be as was shown by the plaintiffs themselves in the court below, let us consider its effect, in connection with the act of 8th May, 1822, as to whether it amounts to a confirmation of plaintiffs' claim. This act of Congress is based upon the commissioner's report, and operates only as a confirmation of *such* claims as, *in the opinion of the commissioner*, expressed in his report, ought to be confirmed.

Turning to the report, in which are embraced the claims under consideration, we find none recommended by the commissioner for confirmation, except such lots as "*were inhabited and cultivated under the Spanish government, or such as were built upon by the permission of the Spanish authorities.*" Does this claim fall within this category?

The report containing it was made by the commissioner to the General Land-Office on the 2d January, 1816. The lots were inhabited and cultivated about thirty-six years before that time. Was this a habitation and cultivation under the Spanish government? Our first impression was, that it should be so considered; but upon more mature consideration, we are satisfied that impression was wrong. It is matter of public history that the Spanish took possession of Mobile, by conquest from Great Britain, on the 14th March, 1780, (2 Pickett's History of Alabama, p. 41; Martin's History of Louisiana, vol. 2, p. 52); and if we go back thirty-six years from the time the commissioner reported, we shall go beyond

the time when Mobile was taken from the English. When, however, we recur to the proof exhibited to the commissioner in support of the claim, and submitted by him to the government, it is perfectly clear that these lots were neither built upon, inhabited, nor cultivated under the Spanish government. The only witnesses examined, Lorent and Mitchell, both concur that the English put fire to the house of Madam Rochon, during the siege of the fort by the Spanish; and it, "*with all her improvements*," was burned; since which time, there was no proof of inhabitation or cultivation under the Spanish government. When these improvements were destroyed, the English were in possession of the town; the Spanish authority had not been established, or recognized.—Indeed it may well be questioned, whether the place could be said to be under the Spanish government until it was so recognized by the treaty of peace. Mr. Vattel says (p. 386) that "Immovable possessions, lands, towns, provinces, &c., become the property of the enemy who makes himself master of them; but it is only by the treaty of peace, or the entire submission and extinction of the State to which those towns and provinces belonged, that the acquisition is completed, and the property becomes stable and perfect." But dating the Spanish rule from the capitulation of the fort, until which time the English certainly held the actual possession and government of it, it is clear the inhabitation and cultivation did not then exist. The improvements had been destroyed, and although their destruction may have been (and probably was) one of the results of war between England and Spain, yet, we apprehend, the United States did not intend, by the acts providing for confirmation of title, to make compensation for such casualties. If, during the siege, the inhabitants, then being subject to the government of Great Britain, had destroyed all their improvements, and abandoned the place to the enemy, or capitulated, and had never re-possessed themselves of their respective lots—had never re-built, or cultivated in any way afterwards—it would be a contradiction in terms to say that they had inhabited and cultivated these lots under the Spanish government; and what would be true of them in the aggregate, is equally true when applied to each individual. Madam Rochon's possession was under the British,

not the Spanish government; and this report, which certifies the facts, and does not give in terms the opinion of the commissioner as to whether the claims should be confirmed, fails to show that it falls within the class recommended for confirmation. Claims of this kind might well, we think, have constituted a distinct class, and no doubt would have been reported upon as such, had the commissioner, under the powers vested in him, deemed them proper for confirmation. Doubtless there were a number of similar sufferers from the casualties of the war. But they were not recommended as proper to be confirmed, and it is not for the courts to speculate upon the justice or propriety of withholding the sanction of the government of their validity. We must take the act, with the report and the accompanying proof, as we find them; and if from the report, as explained and aided by the proof, we are unable to see that in the opinion of the commissioner they ought to be confirmed, it is our duty to hold that the act confers no title, or gives no validity to such claims.—Doe *ex dem.* Hall v. Root, 19 Ala. 378-395.

The appellees, however, insist that their confirmation is established by analogy to the case of Doe v. Eslava (9 How. Rep. 421), where the report was "Cultivation and inhabitation:—A house built, in which R. Farmer lived for twenty years, and until the Spaniards took possession of the country." The proof in that case, also, showed that the house was burned when the Spaniards took possession of the country, upon the treaty after the close of the American revolution.

We have looked into that case, and it appears that no question as to the fact of confirmation was raised, either in the Supreme Court of this State, or of the United States. This point appears to have passed unnoticed; and while this, of itself, is persuasive to show that the report in the case before us may recommend the claim for confirmation, yet we do not esteem it in the light of a judicial determination of the question; for if it could be viewed in that light, it would be our duty, as well as our pleasure, to yield to the decision.

In conclusion, we feel quite confident that Madam Rochon's residence upon the lot in question while the British held possession, and the burning of her house and improvements by the British *pending* the siege by the Spanish army, in the

absence of any proof that she afterwards dwelt upon or cultivated the lots, do not show she inhabited and cultivated the lot under the Spanish government, as recommended by the report and required by the act of 8th May, 1822, in order to a confirmation. To meet the requisitions of the act, she must have lived upon the lot,—inhabited it and cultivated it after Spain took possession of the place. Constructive possession, or the bare assertion of a claim, without an actual possession, is not sufficient. She must have dwelt upon, or inhabited the lot,—must have had such possession under the Spanish government as that the Spanish laws would have operated upon it as a present actual possession. If we depart from the plain, common-sense meaning of the terms used by the commissioner, all is uncertainty. We will be at sea without chart or compass. If an inhabitation one day, or two days, before the Spanish authority came in, may suffice, why may not one year, or two years? Where shall we stop? and by what rule shall we be governed? The only safe rule is, to require inhabitation and cultivation after the place was subject to the dominion of Spain and governed by Spanish laws.

As the claim of the plaintiffs below was shown not to fall within this class of cases, we feel constrained to hold, that it was not confirmed by the act, and consequently, that they showed no title to the lot sued for. The view we have felt it our duty to take upon the question of confirmation is opposed to several of the charges given by the primary court; and as it will probably be conclusive of the case, so far as the State courts are concerned, we deem it unnecessary to notice the other points raised upon the argument.

Judgment reversed, and cause remanded.

COCKRELL AND WIFE *vs.* GURLEY.

1. The rule as to form in pleadings is not as stringent in equity as at law, but the substance of the rules is the same in each court; and it is a principle of universal application in pleading, founded on reason and good sense, that the plaintiff's title should be stated with sufficient certainty and clearness to enable the court to see plainly that he has such a right as warrants its interference, and the defendant to be distinctly informed of the nature of the case which he is called upon to defend.
2. Where a bill in equity was filed to protect complainant's remainder in certain slaves, alleging that her father died in Kentucky in 1825, leaving a widow and complainant his only child; that letters of administration were granted on his estate, "and some time afterwards dower was allotted and assigned to the said E. (the widow) in her husband's estate, and among the negroes so allotted was a negro woman" (who was particularly described in the bill, and was alleged to be the mother of the other slaves in whom the remainder was claimed); and "that by the statute laws of Kentucky, at the time of the decedent's death, and the allotment of dower to the widow as aforesaid, she was only entitled to a life interest in said slave, and the estate in remainder vested in complainant": *It was held*, that the bill was fatally defective, in not setting out the proceedings by which the widow's dower was assigned, and the statute which gave the widow only a life estate in the slaves allotted, with remainder to the complainant.

APPEAL from the Chancery Court of Franklin.
Heard before the Hon. A. J. WALKER.

THIS bill was filed by the appellants, John B. Cockrell and Mary Ann his wife, against Davis Gurley, to protect said Mary Ann's alleged remainder in certain slaves which were in the defendant's possession. It alleged, that Henry B. Haley, who was the father of complainant Mary Ann, died in Kentucky, in 1825, "leaving his widow, Elizabeth Haley, and their said daughter Mary Ann, the sole heirs of his estate; that the widow afterwards married one William Dickey, who is still living and residing in Kentucky; that letters of administration on the estate of said Henry B. Haley were granted in 1825, by the County or Circuit Court of the county in which he died, to one Maximilian Haley; "that some time thereafter the dower was assigned and allotted to the said Elizabeth in her said husband's estate, and among the negroes so allotted was a negro woman by the name of Chaney, then

about —— years of age, and of —— complexion"; that after the marriage of said Elizabeth with said Dickey, the latter sold the said slave Chaney, and the children which she then had, to one Isaac Farris, who afterwards sold them to the defendant; "that by the statute laws of Kentucky, at the time of the death of the said Henry B. Haley, and the allotment of dower to his widow as aforesaid, she was only entitled to a life-estate interest in said negro Chaney and her increase, and the estate in remainder vested in the said Mary Ann, the only child of said Henry B. and Elizabeth."

The defendant demurred to the bill for want of equity, and the chancellor sustained the demurrer, on the ground that the bill did not state the complainants' title with sufficient accuracy and clearness; and his decree is now assigned for error.

L. B. THORNTON and JNO. A. NOOE, for the appellants:

The complainants' interest in the slaves, or title in remainder, is alleged with all the certainty that is required by the most stringent rules of pleading in equity. To entitle them to the relief sought by the bill, all that was required of them was, to show or allege the character of their title or interest in the slaves, and that their interest was in such jeopardy as authorized them to ask the protection of chancery. The allegation of complainants' title is sufficiently clear to show what interest they claimed in the slaves, and that they relied on the statute law of Kentucky to sustain that title. Much less stringency in pleadings in equity is required than at law; and all that is required in a declaration is, that the plaintiff shall state the nature of his title with such certainty that the defendant may know what he relies upon, or what he himself has to defend against. The bill in this case clearly notifies the defendant, that the complainant Mary Ann claims an estate in remainder in all the slaves named in the bill, and that she will rely, as evidence of her title, upon the statute laws of Kentucky, under which, as she alleges, her mother is only entitled to a life-estate interest, and complainant to the estate in remainder. That the allegation is sufficient, under the most stringent rules of pleading adopted by this court, we refer to the following authorities;—Gibson v. Carson, 3 Ala. 421;

McKinley v. Irvine, 13 *ib.* 693, and authorities referred to on pp. 694-700; M. & C. P. Railroad Co. v. Talman, 15 *ib.* 485; Calhoun v. Cousins, 3 *ib.* 501.

The statute of Kentucky was a fact to be proved, like a deed or any other instrument of title. It is not required that the statutes should have been alleged *in hæc verba*; indeed, it would have been improper to encumber the record with them: it was only necessary to allege that the complainants claimed by virtue of the statutes, and to introduce them, properly authenticated, as evidence of their claim.

WM. COOPER, *contra*, cited the following authorities:—Wright v. Dame, 22 Pick. 55; Pardee v. De Cala, 7 Paige's Ch. 132; Wood v. Genet, 8 *ib.* 137; 2 Bland's R. 686; Harding v. Handy, 11 Wheat. 103; Jackson v. Ashton, 11 Peters 249; Andrews & Bro. v. McCoy, 8 Ala. 926; Thomas v. Warren, 15 Verm. 110; Smith v. Ballantyne, 10 Paige Ch. 103; White v. Lewis, 2 A. K. Marsh. 123; *ib.* 315; 2 B. Mon. 1.

GOLDTHWAITE, J.—The object of the suit is, to protect the title of the complainants to the remainder in certain slaves; and the bill avers, that one Henry B. Haley died in the State of Kentucky, in 1825, leaving his widow Elizabeth, and the complainant Mary Ann Cockrell, then Mary Ann Haley, his only child; that letters of administration were taken out by one Maximilian Haley, "and that some time thereafter, dower was assigned and allotted to the said Elizabeth in her said husband's estate, and among the negroes so allotted was a negro woman by the name of Chaney", who is one of the slaves in relation to which the interference of the court is prayed, and the others are her children, alleged to have been born since the assignment. The bill also avers, "that by the statute laws of Kentucky, at the time of the death of the said Henry B. Haley, and the allotment of dower to his widow as aforesaid, she was only entitled to a life interest in the said negro Chaney and her increase, and the estate in remainder vested in the said Mary Ann." These are the only allegations of title which are to be found in either the original or the amended bills; and the only question is, whether, under the rules of pleading, the title of the complainants is stated with sufficient clearness and accuracy.

It will be seen from the extracts we have made from the bill, that the complainants' title rests entirely upon the assignment of dower made to the widow of Henry B. Haley, and the statute law of Kentucky, which (it is averred) invested the widow with the life estate, and the daughter with the remainder, in the slaves assigned. There is no allegation that the dower was allotted in conformity with the laws of Kentucky, or that the proceedings were had by the authority, or under the direction of any court. The rule as to form in pleading is not so stringent in equity as at law, but the substance of the rules is the same in each court; and it is a principle of universal application in pleading, founded on reason and good sense, that the title of the plaintiff should be stated with sufficient certainty and clearness to enable the court to see clearly that he has such a right as warrants its interference, and the defendant to be distinctly informed of the nature of the case he is called upon to defend. We know that, by the common law, the widow was not entitled to dower in a chattel, and that the title to slaves vested in the legal representative of the intestate. The common law must be presumed to prevail in Kentucky; and an assignment of dower in a slave would confer no title, unless by the operation of the statute law of that State, and proceedings had in conformity with that law. Conceding that the bill contains an averment, in substance, that by the statutes of Kentucky the widow is entitled to dower in slaves, we should still regard the bill as defective in not setting out the proceedings by which the dower was assigned, as well that the defendant might take advantage of any want of authority in those acting, as that the court might see that they were authorized by the law of the jurisdiction in which the proceedings were had. We would not be understood as deciding, that where dower was assigned by the decree or judgment of a court of record of a sister State, it would be necessary to set out the law and the facts which conferred jurisdiction; on the contrary, we incline to the opinion that the judgment of a court of record of one State is *prima facie* evidence of jurisdiction in every other State. But however this may be, we entertain no doubt that in suing upon such a judgment, it would be necessary to allege in what court it was rendered; and neither at law nor

in equity would the mere allegation that a judgment had been rendered be sufficient. If the proceeding was not sanctioned by the judgment of a court, it is entitled to no faith or credit, except such as it can derive from the law of the jurisdiction in which it was had; and if in opposition to the course of the common law, it must be set out, as well as the proceedings; and if such allegations are wanting, the court cannot intend that the dower was assigned in the mode provided by laws which it cannot judicially recognize, and of which it is not advised by the pleadings.

But independently of the ground we have noticed, we are of the opinion, that the law of Kentucky which (it is averred) gave to the widow a life estate in the slaves, and the remainder to the daughter, is not well pleaded. Mr. Chitty, in his work on Pleadings, (vol. 1, p. 216,) lays down the rule, that foreign laws must, in general, be stated in the pleadings, for the reason, that courts cannot, *ex officio*, take notice of them; and in Holmes v. Broughton, 10 Wend. 74, where a plea set out a former recovery for the same cause of action in another State, and a satisfaction of the judgment by appraisement of lands upon execution issued upon such judgment, it was held, that such satisfaction being a course of proceedings unknown to the common law, the plea should have set out the statute, and that the general averment that the proceedings were according to the laws of the State where they were had, and fully authorized by them, was not sufficient. The same principle has also been recognized by the Supreme Court of Massachusetts (Hempstead v. Reid, 1 Mass. 104); and we think it rests upon sound reason. As was said by the chancellor in his decree, "It is the province of pleading to state facts, and not conclusions." In the present case, the averment is, that by the statute law of Kentucky, and the allotment of dower, the widow became entitled to a life estate, and the daughter to the remainder in the slaves; and this is simply stating what the pleader supposes to be the effect of the laws of Kentucky, and is clearly insufficient.

Decree affirmed, at the cost of appellants.

STEWART *vs.* BRADFORD.

1. The exclusion of part of an answer to an interrogatory, which was only admissible (if at all) upon the idea that, when fairly construed, it amounted merely to an expression of the witness' opinion that a slave was worthless, is not a reversible error, when another part of the same answer, which was read in evidence by the appellant, contained a clear statement of the witness' opinion on that point.
2. *Held*, on the authority of Prater v. Miller, 25 Ala. 320, that a verbal promise to pay, or to part with anything valuable, in settlement of a controversy not existing in the form of a pending suit, cannot be enforced in a court of law, without some proof that there was a reasonable ground for such controversy; and that, therefore, in a suit on a note given for the price of a slave, it was not error to refuse to instruct the jury, at the defendant's request, "that if they believed there was a controversy between plaintiff and defendant as to whether plaintiff had defrauded defendant in the sale of the negro, and that plaintiff, in settlement of the controversy, agreed to knock off one hundred dollars on the note, then defendant would be entitled to a deduction for that sum."
3. *Held*, also, on the authority of Bush v. Bradford, 15 Ala. 317, that where the purchaser of a slave accepts a bill of sale without warranty, which shows on its face that he took the slave at his own risk, he cannot defend a suit on the note given for the purchase money, on the ground of "misrepresentation without fraud."

APPEAL from the Circuit Court of St. Clair.
Tried before the Hon. EDMUND W. PETTUS.

WHITE & PARSONS, for the appellant.
MORGAN & MARTIN, *contra*.

RICE, J.—This suit is founded on a note executed by the appellant to the appellee, for a part of the price of a female slave sold by the latter to the former. The contract of sale is evidenced by a bill of sale, which does not contain any warranty, but shows on its face that the appellant took the slave "at his own risk."

On the trial, after the note had been read in evidence, the appellant offered in evidence the deposition of James M. Edwards, who, in his answer to the second interrogatory, makes the following statements: "A few days after Mr. Stewart purchased her (the aforementioned slave), I was at his house,

and examined her at his request, and found her to be so unsound that I would not have had her as a gift." * * * * * "I do not consider the negro worth any thing. I consider her an expense instead of a profit."

The appellee objected only to so much of said answer as reads as follows: "And found her to be so unsound that I would not have had her as a gift." The court below sustained this objection, and the appellant excepted. The other parts of said deposition were read in evidence.

If the words embraced by the aforesaid objection were admissible as evidence, they were only admissible upon the idea, that when fairly construed, they amounted merely to an expression of the opinion of the witness that the slave was valueless. Whether such is a fair construction of those words, we do not say. But conceding that such construction would be correct, and that there was error in excluding those words, yet it was error without injury, because the same witness, in the same answer, gives a clear statement of his opinion, that the slave was not "worth anything," but on the contrary was "an expense instead of a profit;" and this last statement was read in evidence by the appellant. This ruling of the court furnishes no ground for reversal.

The appellant excepted to the refusal to give two charges asked by him, as follows:

"1st. That if the jury believe there was a controversy between plaintiff and defendant as to whether plaintiff had defrauded defendant in the sale of the negro, and that plaintiff, in settlement of the controversy, agreed to knock off one hundred dollars on the note sued on, then defendant would be entitled to a deduction for that sum.

"2d. That misrepresentation, without fraud, may be sufficient to authorize such a defence as is attempted to be set up here."

In Prater v. Miller, 25 Ala. 320, it was decided, that when a plaintiff founds his right of recovery upon a *verbal* agreement or promise of the defendant, he is bound to prove a consideration, in the shape of something either beneficial to the defendant, or detrimental to himself; that the mere existence of a "controversy," not in the form of a *pending suit*, is not, *per se*, a sufficient consideration to uphold a *verbal* promise made

in settlement of such controversy; and that there could not be a recovery on such promise, "without same proof showing a *reasonable ground*" for the existence of the controversy. In other words, it was held that a *verbal* promise to pay or part with anything valuable, in settlement of a controversy not existing in the from of a *pending suit*, cannot be enforced in a court of law, without some proof that there was a reasonable ground for such controversy.

Upon the authority of Prater v. Miller, *supra*, we must hold that there was no error in refusing the first charge asked by appellant; for, if that charge had been given, the jury would have been bound to give effect to the agreement therein mentioned, although they might have believed that there was no "reasonable ground" for the "controversy" referred to in that charge.

Upon the authority of Bush v. Bradford, 15 Ala. 317, we hold, that there was no error in refusing the second charge asked by appellant. For, conceding that there may be cases, in which "misrepresentation without fraud" might be sufficient to authorize the vendee of a slave, when sued for the purchase money, to make a defence, either total or partial, on account of the unsoundness of the slave;—yet it is clear, that no defence can be founded on "misrepresentation without fraud," in such a case as this, where the vendee has accepted a bill of sale which contains no warranty, but shows on its face that he took the slave at his own risk. The court below properly refused to give the second charge, on the ground that it was abstract.

There is nothing in any of the rulings of the court below authorizing a reversal, and its judgment is affirmed.

EWING *vs.* PECK.

1. A judgment quashing an execution, on the ground of the defendant's discharge in bankruptcy, although the court refuses to order satisfaction or discharge of the original judgment to be entered, or a perpetual stay of execution, relates back to the original judgment; and its effect, so far as respects the rights of the parties to that judgment, is to vacate all process issued for its satisfaction.
2. Money paid under a *pluries fi. fa.*, pending a motion to quash a previous execution on the ground of the defendant's discharge in bankruptcy, may be recovered in assumpsit after the rendition of a judgment quashing the writ, unless the party receiving it can show some equity, arising out of the same transaction, which justifies its retention.
3. If the money was voluntarily paid after the return day of the execution, and under no mistake by the party paying it as to his rights, he cannot recover it; but it does not follow that the payment was voluntary, merely because it was made after the return day of the execution, when there was a subsisting levy on the defendant's land: whether it was voluntary or not, under such circumstances, is a question for the determination of the jury.

APPEAL from the Circuit Court of Tuskaloosa.
Tried before the Hon. TURNER REAVIS.

ASSUMPSIT on the common money counts, by Samuel B. Ewing against Elijah W. Peck, to recover money paid by the plaintiff under a *pluries* execution against himself, which was issued on a judgment in favor of Peck & Clark. The money was paid to the sheriff one day after the return day of the execution, which had been levied on said Ewing's land; and at that time there was a motion pending to quash a previous execution on the same judgment, on account of the defendant's discharge in bankruptcy, which motion was afterwards granted, but the court refused to order satisfaction of the judgment or a perpetual stay of execution.

On these facts, the court charged the jury, in effect, that they should find for the defendant; and this charge is now assigned for error.

J. L. MARTIN, for appellant:

1. The judgment quashing the *alias fi. fa.*, based (as it was) upon the ground that the judgment on which the *fi. fa.* issued was discharged by the certificate of discharge in bankruptcy,

vacated and annulled the *pluries fi. fa.*, and rendered it no protection to the defendant in retaining the money collected under it. No direct proceeding was necessary to quash the *pluries* execution, which was but a continuation of the first: if the first execution was vacated, or declared void, for want of vitality in the judgment on which it was founded, a subsequent one was rendered void by the same proceeding.

2. That assumpsit is the proper action to recover back the money paid under the execution, see the following authorities: Williams v. Simmons, 22 Ala. 425; Roebuck v. Dupuy, 7 *ib.* 484; Burdine v. Roper, *ib.* 466; Ewing v. Peck & Clark, 17 *ib.* 339.

3. It cannot be successfully contended, that the payment by Ewing was voluntary. In the first place, it was paid to the sheriff in whose hands the execution was at the time, and who had under his control, in virtue thereof, property of Ewing to a sufficient amount to satisfy it. As well might it be said, that a criminal, condemned to death, voluntarily submitted to the sheriff's halter, and was thereby a *felo de se*, as that a payment made under such circumstances was voluntary. Whether the money was paid before or after the return day of the execution, can make no difference in determining its character. The payment was made to the sheriff of a county remote from that in which the judgment was rendered, and to which the execution was returnable, and it was made only one day after the return day of the execution. The charge, under such circumstances, amounts to this: That the jury cannot doubt, that Ewing knew the precise day on which the court to which the execution was returnable commenced; that he knew the sheriff had no power to sell his property levied on under the execution in his hands—that it was *functus officio;* and that Ewing, from some unknown motive, under no restraint whatever, but of his own free will, and understanding all the facts, paid the amount of the execution to the sheriff as the authorized agent of Peck & Clark. As to voluntary payment, see Evans v. Governor, 18 Ala. 659; Rutherford v. McIvor, 21 *ib.* 750.

E. W. Peck, *pro se, contra:*

1. The judgment on which the *pluries* execution was issued

was a valid judgment; it had not been reversed, vacated, or set aside; and consequently the said execution was lawfully issued.—Cogburn v. Spence, 15 Ala. 549.

2. The money sought to be recovered in this case was either paid under the said execution, or it was not. If paid on the execution, it cannot be recovered back, because paid on a valid execution; if not paid on the execution, then it was a voluntary payment, in satisfaction of a lawful judgment, which, *ex æquo et bono*, the appellant may retain.—Jones v. Watkins, 1 Stew. 81; University v. Keller, 1 Ala. 406; Dupuy v. Roebuck, 7 *ib.* 484.

CHILTON, C. J.—Ewing insisted that a judgment which Peck & Clark had obtained against him in the Tuskaloosa Circuit Court was discharged in consequence of his certificate of discharge in bankruptcy, and moved in said Circuit Court to quash an *alias* execution of *fieri facias* which had issued thereon, and had been levied on his real estate, as well as to enter the discharge of the judgment, and for a perpetual stay of execution.

The court, upon the trial of the motion, refused to grant it, and gave judgment against Ewing for the costs. This judgment was reversed by this court, the case sent back, the motion re-tried, and judgment entered quashing the execution; but the court refused to enter the judgment as discharged by the certificate, or perpetually to stay execution.

Pending the motion, and before the judgment quashing the *alias fi. fa.* was rendered, Peck & Clark sued out a *pluries fi. fa.*, which was placed in the hands of the sheriff of Mobile, and by him levied on the real estate of Ewing, who paid the money to the sheriff on the day after the commencement of the term of the court to which said *pluries* execution was returnable. Mr. Peck then wrote to Mr. Adams of Mobile, requesting him, if he had not previously sent the money which he had received from the sheriff of Mobile, collected on an execution of Peck & Clark against Samuel B. Ewing, to pay it to Charles Hopkins of Mobile, and it was accordingly so paid. To recover this money, so collected and paid, the appellant brought this action. The court charged the jury, that if they believed the above facts, they should find for the de-

fendant. This charge is assigned for error, and presents the only point for our revision.

We are of opinion, that the effect of the judgment quashing the execution, upon the ground of Ewing's discharge in bankruptcy, was to vacate all process issued for its satisfaction. The plaintiffs in that judgment were tendered an opportunity of controverting the discharge, if it had been fraudulently obtained; but failing to do so, they are concluded by it, until it is reversed, or in some way annulled. The discharge having thus been judicially ascertained, and virtually enrolled as a part of this case, although the court refused to order the judgment to be satisfied or discharged, or a perpetual stay of execution, yet the discharge in bankruptcy relates back to the judgment, and operating a discharge of that, discharges or vacates all process dependent on it, so far as respects the rights of the parties to such judgment. We say nothing as to the rights of purchasers not parties or privies, who may have acquired property at a sale made under the process before the judgment quashing the execution.

Under this view of the case, although when the money was collected by the sheriff of Mobile, the execution in virtue of which it was collected was subsisting, yet, being vacated by matter posterior, this action for money had and received lies to recover it back, unless the party receiving it can show some equity, arising out of the same transaction, which justifies its retention.—5 S. & P. 119; 7 Ala. 848; 9 *ib.* 803; 11 *ib.* 999, and cases there cited; see, also, 15 Mass. 207; 10 Ala. 313; 22 *ib.* 425.

But it may be said, the judgment, although discharged by the bankrupt's certificate, constituted a good moral consideration to support a payment, and if the plaintiff in this action made a voluntary payment to the sheriff, after the return day of the execution, and when the sheriff, as such, had no authority to receive it, he cannot recover it back.

It is certainly true, that if the payment was voluntary, and made under no mistake as to the rights of the party making it, he cannot afterwards recover it back. But it does not follow that the payment was voluntary, merely because it was made when the sheriff's authority to enforce the collection had ceased. There was then a subsisting levy upon Ewing's

land, and he was engaged, by the pendency of his motion in the Circuit Court, in an attempt to rid himself of the process. On the other hand, the plaintiffs in the judgment were in pursuit of their debt by legal process, unwilling to await the action of the court upon the motion to quash, and they treat the money as though it had been collected under the execution, adopting the sheriff's act in receiving it. Now we will not say, that the payment, under these circumstances, may not have been voluntarily made; but whether it was or not, was a question for the jury, and one which the court could not properly determine,—a question of intent, as being the free act of the party, or as being superinduced by the process of levy. If the payment was made to avoid the levy, or if Ewing, to avoid the sale of his land, had promised the sheriff to pay the money, and in fulfilment of the promise had paid it, there would be no propriety in saying that such payment was voluntary. True, in one sense, it is a willing payment; but the will is influenced or impelled by the circumstances, growing out of the proceedings to enforce the collection of the judgment.

Judgment reversed, and cause remanded.

PICKENS *vs.* YARBOROUGH'S ADMINISTRATOR.

1. If a debtor deposits with his creditor, unconditionally, notes on a third person as collateral security, the latter thereby acquires the control and direction of their collection, and it becomes his duty to take all necessary measures to prevent the discharge of any of the parties thereto; and in such case notice to bring suit on them should be given to him.
2. If the creditor receives the notes under a special agreement, by which he is not to sue, but to collect in any other mode, he must, as to all persons without notice of the extent of his powers, be regarded as the general holder, and notice to sue may be given to him.
3. *It seems*, that if a surety notifies the holder of the note of his suretyship, and requires him to bring suit against the principal, this is a substantial compliance with the requisitions of the statute, (Clay's Digest, p 532, § 6.)

and the party entitled to receive the notice may waive its being in writing; but, whether sufficient or not under the statute, it is good as a common-law notice, when connected with proof of the holder's failure to sue the principal and consequent damage to the surety.

APPEAL from the Circuit Court of Perry.
Tried before the Hon. GEO. D. SHORTRIDGE.

ASSUMPSIT by the administrator of David Yarborough, deceased, against James C. Harrell and Joseph Pickens, "to recover the amount of thirteen promissory notes made by the defendants and one John Reed the 16th day of January, 1843, and payable one year after date to L. A. Weissinger, late executor of the last will and testament of said David Yarborough, in the sum of $45 each; which notes, as a part of the unadministered assets of the said Yarborough's estate, were turned over by said Weissinger, as executor, to plaintiff." The suit was commenced in January, 1850.

The defendant Pickens separately pleaded *non assumpsit*, payment, fraud, failure of consideration, want of consideration, and three other special pleas, which were as follows:

"1. That he is surety for said Harrell, his co-defendant, on the several promissory notes sued on in this case, and that he, as such surety, at ———, to-wit, in the county aforesaid, on the first day of February, 1844, gave notice in writing to said L. A. Weissinger, (he being then the qualified executor of said David Yarborough,) according to the statute in such case made and provided, requiring said Weissinger, as such executor, to bring suits on said notes, against the makers thereof, as soon as the law would permit; and said defendant in fact says, that said Weissinger, executor as aforesaid, did not, in a reasonable time thereafter, and after said notes became due, commence suits on said notes, and proceed with due diligence, by the ordinary course of law, to recover judgment for, and by execution to make, the amounts due on said notes, although said Weissinger continued for a long space of time after said notice was given, to-wit, for the space of three years, to hold the office of such executor; and said defendant further avers, that no suit was ever brought on said notes, until this suit now pending was instituted."

"2. That heretofore, to-wit, on the first day of February,

1844, he gave the executor of the estate of said Yarborough verbal notice to sue, and that suits were not brought; and that defendant was thereby injured in this, to-wit, that if suits had been brought when required, the money could have been made out of his principal."

"3, Same as first, except that notice in writing was waived."

Issue was joined on all these pleas, and the trial resulted in a verdict and judgment for the plaintiff; and against the defendant Harrell a judgment by default was taken.

On the trial, as appears from the bill of exceptions, after the plaintiff had read in evidence the several notes on which the suit was founded, the defendant Pickens introduced one Hugh Davis as a witness, "whose evidence was, in substance, as follows: That he was the attorney of John V. Cawthorn, and as such had charge and control of a note for $5,000, signed by James C. Harrell and David Yarborough, for the purpose of collecting the same; that he brought suit on said note, in the Circuit Court of Perry county, against said Harrell, and recovered judgment for the whole amount due thereon in November, 1843; that said Yarborough died, and Leonard A. Weissinger became his executor; that the estate of said Yarborough was largely insolvent, and on the 15th day of August, 1844, decrees were rendered by the Orphans' Court of said county, in favor of creditors of said estate, against said executor, for amounts severally due to them from the assets of said estate; that said note of Cawthorn's was presented by witness against said estate, and on said 15th August, 1844, a decree was rendered in his favor for the per-cent due from said estate on his note, amounting to the sum of $1,100, against said executor; that said executor was anxious to make some arrangement with the creditors of said estate who had obtained decrees against him, by which some indulgence should be extended to him, he agreeing to convey his property to secure said creditors; that witness, as agent or attorney of said Cawthorn, was not willing to assent to said arrangement, without some further security than that proposed by said executor; that thereupon said Weissinger agreed to place, and did place, in the hands of witness, the notes in plaintiff's declaration mentioned, to be held as collateral security to said Cawthorn's decree in said Orphans' Court, witness then

being, as before stated, said Cawthorn's attorney to collect said claim; that Harrell had paid about $1,500 on the judgment against him in the Circuit Court, which had not been credited thereon, and that it was understood and agreed between witness, Harrell and said executor, that the whole amount of said judgment should be collected by execution from said Harrell, without regarding said credit of $1,500, and that enough of the moneys collected in place of said credit should be applied in discharge of the notes mentioned in plaintiff's declaration to satisfy the same; that this course was agreed on and adopted as a summary method of collecting said thirteen notes; that said executor desired to have said notes collected in this way, so that the moneys due thereon should be ready, at a proper time, either to be distributed with the other assets of said estate, or to be used in discharging said Cawthorn's decree in the Orphans' Court, in the event that the same should not be paid from some other source (but there was no evidence to show that said Davis had authority to collect said notes in any other way); that this arrangement was entered into about the time, or in a short time after the date of said decree in the Orphans' Court.

"Said Davis further testified, that he considered himself the agent of said Leonard A. Weissinger; that after said notes were thus placed in the hands of witness, to-wit, in the fall of 1844, Alex. Graham, Esq., the attorney of said Pickens, under the written instructions of said Pickens, gave notice to said Davis, that Pickens was only the surety of Harrell on said notes, and to bring suit on said notes against the parties thereto, and sat down at a table and commenced drawing a written notice, which said Davis waived, and said he would admit notice, and then told Graham that Pickens need not give himself any further trouble about said notes, because an arrangement had been made by which the same would be paid without resorting to him for the money due thereon; that at the time said notice was so given, said Harrell was solvent, and so continued until the summer of 1845, and that if suits had been brought on said notes within a reasonable time after said notice was given, the money thereon could have been made out of said Harrell; that Harrell had been insolvent since the fall of 1845, and still so

continued; that said notes remained in the hands of said Davis four or five years after they were so placed there.

"Plaintiff then introduced said Leonard A. Weissinger as a witness, who stated the following, in substance: That in the latter part of the year 1844, he was desirous of giving a deed of trust on his lands, and at that time said Cawthorn, for whom said Hugh Davis was acting as attorney, had a judgment against him as the executor of Yarborough's estate; that he went to Davis, to see if he, as attorney for Cawthorn, would assent to his giving the deed of trust, and would remove any liens that might be in the way of his making said deed; that Davis refused to do so, unless he as attorney and the rights of his client could be protected; that witness then placed in the hands of Davis, as attorney for Cawthorn, the notes now sued on, as collateral security for the payment of the decree, and for that purpose only; that Davis was not his agent, and was not acting as attorney for him in the collection of said notes, but that said notes were placed in his hands for the indemnity of his client, Cawthorn; that he was never notified to bring suit on the notes now sued on, and that if he had been notified, he would have sued on the same; that an arrangement was made between Harrell and Davis, such as the one mentioned by Davis, but that he was not a party to the same. He further stated, that he was once present when Davis told A. Graham of the arrangement made by which the money could be realized from a sale of Harrell's property to pay said notes, and that Graham expressed himself satisfied with the arrangement; but witness had no recollection of being present at any time when Graham had given notice to Davis for Pickens to bring suit on said notes. On cross-examination by defendant Pickens, Weissinger deposed, that Harrell was the principal maker of said notes, and that Pickens was his surety on the same; and that he continued executor of the estate of said Yarborough more than twelve months after said notes were so placed in the hands of said Davis.

"All the foregoing evidence of the witness Davis was then objected to by the plaintiff, and the court sustained the objection, and excluded the same from the jury, on the ground that it was not sufficient to show such agency in Davis as that notice to him to sue on said notes would discharge said Pickens

as surety on the same; and also, that, although said Davis held said notes as collateral security to said Cawthorn's claim, notice to him to bring suits on said notes would not discharge said Pickens; and to this ruling of the court said Pickens excepted.

"Said Pickens then offered to prove, that in a conversation between himself and said Davis, in January or February of the year 1845, that Davis, while said notes were in his possession as aforesaid, told Pickens to give himself no further uneasiness about said notes; that the notice which he had given him (Davis), through Mr. Graham, would discharge him as surety on said notes. To this evidence plaintiff also objected, and the court sustained the objection, and excluded the same from the jury; and said defendant thereupon excepted."

These two rulings of the court are now assigned for error.

I. W. Garrott, for the appellant:

1. Davis held the notes as collateral security; and no other person, not even Weissinger himself, had the right to control them, or to collect the money due thereon, by suit or otherwise. He was, therefore, the only person to whom notice could have been given; notice to Weissinger, after he had parted with the notes, would have been futile. As to the rights of holders of collateral securities, see Trotter v. Crockett, 2 Port. 401; Russell v. Hester, 10 Ala. 536.

2. Davis deposed, that he was Weissinger's agent, and that he, Weissinger, and Harrell had made an arrangement to collect these notes; while Weissinger, who was introduced by plaintiff below, denied this; and thereupon the court excluded all the evidence—that is, the court assumed the right to determine from this conflicting evidence that Davis was not the agent of Weissinger. The court should have allowed the evidence to go to the jury, and let them decide who should be believed, and whether or not Davis was agent in fact; in this, the court clearly invaded the province of the jury. Notice to the agent is notice to the principal.—Story on Agency, § 140. Whether Davis was authorized to grant indulgence to Weissinger, or to receive this collateral security, does not appear; but from the facts deposed to by him, it seems clear that he was Weissinger's agent and attorney for collecting said notes,

and notice to him, therefore, would be sufficient. To allow a recovery against Pickens, after what is shown to have passed between him and Davis, and between his attorney and Davis, would be to allow the perpetration of a fraud; because he was completely lulled into security thereby, and prevented from proceeding to have the money collected from Harrell at a time when he was solvent.—See Teague v. Russell & Moore, 2 Stew. 420, where the question is settled.

3. The evidence of Davis, that he "considered himself" Weissinger's agent, was not objected to on the ground that it was illegal: it was allowed to be introduced, and was then excluded by the court, not on the ground that it was illegal, but because it "was not sufficient" to establish the fact of agency. The appellee cannot raise a question here, which was not raised in the court below, and on which that court did not pass.

Jos. R. John, *contra*:

1. The holder of collateral security for a special object has not the legal title, and is not the owner's agent, except for the special purpose for which it was placed in his hands. Davis was not the general holder of the notes; his agency was expressly limited to the single purpose of collecting from Harrell in the manner stated. He was not the agent to collect from any other party to the notes than Harrell, and from him only in a particular manner. If he had been clothed with authority to collect generally, he would have had the right to sue; but it is shown that he had no right to sue, and had not even the right to receive the money. Notice to the agent is only binding on the principal "when it arises from, or is at the time connected with, the subject-matter of the agency."—Story on Agency, §§ 126, 133, and n. 1, 140.

2. Graham was the authorized agent of Pickens in this particular matter, and Davis explained to him the understanding and arrangement for the collection of the notes, and consequently his authority. Pickens, then, knew the extent of Davis' authority, and cannot complain.

3. The declarations, admissions, or acts of an agent, to bind his principal, must be in regard to the matter to which his authority relates, and then they must be part of the *res*

gestæ.—Story on Agency, §§ 134-5-6, and n. 1; Greenl. Ev., §§ 113, 114.

4. The evidence was correctly ruled out, because it was illegal.

5. The notice was clearly insufficient. Davis only waived notice in writing; and if it had been in writing, it would have been insufficient. It was not a statutory notice, and was not good as a common-law notice.—Shehan v. Hampton, 8 Ala. 945.

6. There was no conflict between the testimony of Weissinger and that of Davis: the latter did not say that he was agent, but that he "considered himself" agent; while Weissinger expressly says he was not.

7. There was no fraud on Pickens; and, even if Davis did commit a fraud on him, this could not in any way affect the rights of Yarborough's representatives. Weissinger could not authorize the commission of a fraud; and if Davis committed a fraud without authority, he alone is responsible for the consequences.

GOLDTHWAITE, J.—As a decree had been rendered against the estate of Yarborough, the representative of that estate had authority to pledge the notes sued on as collateral security for its payment.—Wheeler v. Wheeler, 9 Cow. 34. It is clear, also, under our decisions, that where a creditor has received notes as collateral security for his debt, *unconditionally*, without any instructions governing the course of collection, he is bound to take the necessary steps to perfect the liability of the parties; and if the security is lost, or rendered unavailable, by his neglect, he must bear the loss.—Russell v. Hester, 10 Ala. 535, and cases there cited.

In the present case, however, it is urged on the part of the appellee, that the same principle does not apply, for the reason, that the party who received the notes had not authority to sue, but was by his agreement confined to a particular mode of collection. We think, the evidence, as set forth in the record, leaves this question in some doubt; but conceding that Davis received the notes simply as a deposit, or pledge, to secure the payment of the decree, and without authority to sue, we still think the notice was properly given to him.

Weissinger was, in law, the owner of the notes. If he deposited them in the hands of a third party, to secure the payment of a decree which had been rendered against him in his representative capacity, retaining the power of control and direction so far as suit was concerned, the party in whose hands they were placed must, in law, be regarded as his agent to receive the money due upon the notes. The possession of the notes by Davis, with the consent of the owner, and the authority to receive the money, was *prima facie* evidence that he was authorized to act generally in relation to them. Erick v. Johnson, 6 Mass. 196. Were the rule otherwise, it would, in many cases, operate as a fraud. If Davis, when the notice was given him, had explained the extent of his powers, under the aspect in which we are considering it, it is possible that the case might be different; but the record does not advise us that such was the case. Davis states in his evidence, that after the notice had been given, he informed the agent of Pickens that his principal need give himself no further trouble about the notes, as an arrangement had been made by which they would be paid without resorting to him for the money; but from this testimony we would not be warranted to infer, as a legal conclusion, that the extent of the authority of Davis in relation to the notes was made known.

Our conclusions are, briefly, these: If a debtor deposits notes unconditionally with a creditor, as security for a debt, he thereby gives to the latter the control and direction so far as their collection is concerned, and it then becomes the creditor's duty to take all necessary measures to prevent the discharge of any of the parties to the notes received by him. If the creditor receives the paper under a special agreement, by which he is not to sue, but to collect in any other mode, he must, as to all parties without notice of the extent of his powers, be regarded as the general holder; and in either aspect, upon the facts as disclosed by the record, the notice may have been properly given. We say "may"; for, assuming that Davis may not have had authority to sue, the court was not warranted by the evidence in drawing the conclusion that the extent of his powers in this respect was made known to the agent of the appellant.

In relation to the sufficiency of the notice: The record

shows, that the agent of Pickens gave notice to Davis, after he had received the notes from Weissinger, and while they were in his possession, that his principal was the surety of Harrell upon them, and to bring suit upon the same against the parties thereto; and this, in our opinion, would have been sufficient as a statutory notice, had it been in writing. It meets substantially the requisitions of the act (Clay's Digest 532, § 6; Shehan v. Hampton, 8 Ala. 943); and it requires no argument to show that the party to whom the notice is to be given may waive its being in writing. If the notice, however, did not fully meet the requisitions of the statute, it would be good at common law, when connected with proof showing the failure to sue, and the damage to the surety from such failure.—Herbert v. Hobbs, 3 Stew. 9; Goodman v. Griffin, *ib.* 160; Bruce v. Edwards, 1 *ib.* 11.

Judgment reversed, and cause remanded.

PATTON ET AL. *vs.* CROW.

1. The common-law distinction stated, between a devise of lands to executors to sell, and a devise that the executors shall sell the lands.
2. Under the statutes of this State, where the testator does not devise his real estate *to* his executors, nor *to* any other person, and does not dispose by his will of the rents and profits accruing after his death, his executors, if they have not exercised the power of sale conferred on them by the will, and if the estate is solvent, may maintain any action for the recovery of the lands which the administrator of a solvent estate might maintain for the lands of his intestate.
3. A misjoinder of plaintiffs in an action of trespass *quare clausum fregit* will defeat a recovery; but there is no such misjoinder when the executors of a deceased tenant in common join with the surviving tenant.

APPEAL from the Circuit Court of Lauderdale.

Tried before the Hon. GEO. D. SHORTRIDGE.

TRESPASS QUARE CLAUSUM FREGIT by Robert M. Patton and James Caruthers and Henry D. Mason, as executors of Henry Smith, deceased, against Isaac N. Crow, "as well to try titles, as to recover possession of the east half of fractional section

seven, township three, range eight, situate and being in Lauderdale county." The only plea was, "not guilty," in short by consent." The bill of exceptions is in these words: "Upon the trial of this cause, after the plaintiffs had introduced as evidence to the jury the following will of Henry Smith, (setting it out at length,) upon motion of the defendant's attorneys, the court charged the jury, that the said Caruthers and Mason, as the executors of Henry Smith, had not such an interest in their said testator's real estate, by virtue of said will, as would authorize them to maintain this suit, and there was a misjoinder of the plaintiffs, as the deed under which they derived title was made to the said Patton and Henry Smith, the testator; to which opinion of the court the plaintiffs excepted, and took a non-suit."

The will of said Henry Smith, as set out in the bill of exceptions, contains this clause: "I desire that my executors shall dispose of all my real and personal property, except such as is hereinafter mentioned, at such time as they may think most to the interest of my estate, and on one, two, and three years' credit, with three good securities and mortgage on the property until final payment be made. Should it be necessary to raise money for the payment of my debts, I desire it to be borrowed until it can be collected from sales of property." The testator then gives several specific legacies, and afterwards follow these clauses: "After carrying into effect the foregoing provisions of this will, I give one half of the remaining portion of my estate to my niece Mary Jane Stoddert and my nephew Henry D. Mason, to be equally divided between them. I also give to Mary Jane Stoddert and Henry D. Mason, in trust for my niece Rebecca Dancy and Joseph D. Mason, the other half of the remainder of my estate, to be equally divided between them."

A deed of trust from John R. Henry and S. S. Henry to Samuel Mosely as trustee, conveying the land in controversy on certain specified trusts, and another deed from Mosely to said Patton and Henry Smith, conveying the land to them by virtue of his power and authority as trustee, are copied into the record; but no reference is anywhere made to them in the bill of exceptions.

The charge of the court is the only error assigned.

R. W. WALKER, for the appellants :

1. If the deed from Mosely to Smith and Patton is a part of the record, the error of the charge is clear. Joint tenants and parceners must join in ejectment.—1 Chitty Pl. 54, (5th Am. edit.).

2. But if the deed is not a part of the record, still the error of the court is manifest. Independent of the statute of 1839, (Clay's Dig. p. 199, § 36,) the will set out in the bill of exceptions gives the executors such an interest in the testator's real estate as would authorize them to maintain ejectment. Lucas v. Price, 4 Ala. 682; Dabney v. Manning, 3 Ohio 321. But without any aid from the will, the effect of the act of 1839 is such that these executors could maintain ejectment. Clay's Dig. p. 199, § 36; Golding v. Golding, 24 Ala. 122-9.

3. Where a bill of exceptions states enough to put the court in error, the court, if consistent with the facts, should insert enough to set itself right; and if it fails to do so, no presumption can be indulged in support of the judgment. Davis v. The State, 17 Ala. 415; Sewall v. Henry, 6 Ala. 226.

In charging the jury that the executors had not such an interest in their testator's real estate as would enable them to maintain the suit, a manifest error was committed, and it was the duty of the court to insert matter (if consistent with the facts) to set itself right. Failing to do this, it is a case of reversal.

The error of the second branch of the charge is even more obvious. This was that "there was a misjoinder of plaintiffs, as the deed under which they derived title was made to the said Patton and Henry Smith, the testator." The court here states to the jury as a fact, that the deed under which the plaintiffs derived title was made to Patton and Smith, and instructs them, that because the deed *was* so made, there was a misjoinder of plaintiffs. Now taking it to be true, as here affirmed by the court, that the deed *was* made to Patton and Smith, *that*, so far from showing a misjoinder of plaintiffs, establishes that the action was properly brought by these plaintiffs—Patton and Smith's executors.

It is immaterial, therefore, whether the deed from Mosely to Patton and Smith is properly a part of the record, or not. *The court relieved us from the necessity of making it a part of*

the record, by assuming, and asserting it as a fact, that the deed was made to Patton and Smith. The charge of the court is embodied in one continuous sentence, but asserting two distinct propositions. If the error of either of the propositions is shown, the court will reverse. There was error in charging that the executors had not such an interest in the testator's real estate as would authorize them to maintain the suit. What facts are set out to correct this error? There was error in charging that "*as* the deed under which plaintiffs derived title *was* made to Patton and Smith, there was a misjoinder of plaintiffs." Thus the record clearly establishes that the court erred, and contains no facts whatever to relieve it from its false position.

Injury is presumed from error unless the record itself rebuts the presumption.—Mims v. Sturdevant, 23 Ala. 664-7; Frierson v. Frierson, 21 Ala. 549; *ib.* 558; Dave v. The State, 22 Ala. 25. When the charge excepted to is *affirmative*, and given by the court of its own motion, or at the instance of the other party, *it is unnecessary to set out the evidence on which the charge is founded.*—Kirksey v. Jones, 7 Ala. 622; Peden v. Moore, 1 S. & P. 71; Ware v. Dudley, 16 Ala. 742.

The distinction is, that if an exception is taken to the *refusal* to charge, the bill of exceptions must embrace enough of the evidence to show that the charge asked was not abstract; but if the charge actually given be excepted to as mistaking the law, no part of the evidence need be stated. Peden v. Moore, 1 S. & P. 71; Tharp v. The State, 15 Ala. 749; Ware v. Dudley, 16 Ala. 742. If an *affirmative* charge is erroneous as a proposition of law, the case must be reversed, as this court will intend that it was not abstract.—Moore v. The State, 18 Ala. 534; Ware v. Dudley, 16 Ala. 742.

The charge given would mislead any jury. It was, in effect, instructing them that the plaintiffs, as executors, had not such an interest in the testator's real estate as would authorize them to bring ejectment, and that because the deed was made to Patton and Smith there was a fatal misjoinder. See Cothran v. Bell, 1 Ala. 423; Eckford v. Wood, 5 *ib.* 136; Sherrod v. Rhodes, 5 *ib.* 84. Besides, in the latter part of the charge the court *assumed* facts, and thereby invaded the province of the jury.—Phillips v. McGraw, 13 Ala. 255.

DAVID P. LEWIS, *contra*:

1. The charge given was abstract, and will not be revised on error. The bill of exceptions fails to set out any evidence that shows the pertinency of the charge to the case before the jury. This court will not revise such a charge on error. Ogburn v. Ogburn, 2 Port. 126; Hollinger v. Smith, 4 Ala. 366.

2. But it is submitted, that the charge, construing the bill of exceptions most strongly against the appellants, is correct. It contains two propositions: 1st, "that the said Carruthers and Mason, as the executors of Henry Smith, had not such an interest in their said testator's real estate, by virtue of said will, as authorized them to maintain this suit"; and, 2d, "that there was a misjoinder of the plaintiffs, as the deed under which they derived title was made to the said Patton and Henry Smith, the testator." The first proposition contained in the charge is the correct construction of the testator's will: the will does not give the executors any such interest as authorizes them to maintain ejectment for their testator's real estate. That power is given them by the statute.—Clay's Digest, p. 199, § 36; Golding v. Golding, 24 Ala. 129; Harkins v. Pope, 10 *ib.* 493. The proposition is correct, also, in another point of view. The right of the executors to recover real estate of their testator, in ejectment, depends upon their right as executors to the rents and profits of the real estate in controversy.—Golding v. Golding, *supra*. Now, in order to reverse for error in this branch of the charge, the court must presume that the executors were entitled to the rents of the real estate,—that there had been no transfer by the testator of the right to the rents of the real estate in question, and that the estate was solvent. In Golding v. Golding, *supra*, this court presumed that the estate was solvent; but that presumption was acted upon, not to reverse, but to sustain the action of the primary court.

3. The second proposition of the charge, in the aspect in which the record presents it to the court, is also correct. Why have the appellants suppressed the evidence of the estate of their testator in the land in controversy? Is it not because its production would show the charge of the court to be correct? Under these circumstances, this court will in-

dulge all presumptions which are not contradicted by the record to sustain the judgment below.—Morrison v. Morrison, 3 Stew. 444. If necessary to sustain the judgment, this court will presume that the deed to Patton and Smith gave them an estate as trustees, which, by operation of law, survived to Patton alone.

RICE, J.—According to the common law, as it hath been as far back as the reign of Henry VI, if one devise that his executors shall sell his land, and die seized, his heir is in by descent, and consequently the executors have only a power; but if one devise his land to his executors to sell, then the freehold passes to them by the devise. "This distinction"—namely, between a devise of lands *to executors to sell*, and a devise *that executors shall sell the land*—is mentioned by Justice Doderidge as a "common difference", and it received the sanction of Littleton and Coke and of modern determinations.—Litt. § 169; Co. Litt. 113 a, 181 b; Honnell v. Barnes, Cro. Car. 382; Yates v. Compton, 2 P. Williams 308; 4 Kent's Com. 320; Peck v. Henderson, 7 Yerger's R. 18; Jackson v. Schauber, 7 Cowen's R. 187; Ferebee v. Proctor, 2 Dev. & Batt. Law Rep. 439.

But in Masterson v. Girard's Heirs, 10 Ala. R. 60, it is correctly said by the court, "we have many statutes, which seem together to constitute a system, and create some important modifications of the common-law incidents of descents. Thus, by a general statute, the real estate of a decedent is made chargeable with his debts; and by several others, the administrator is invested with the power to proceed in the Orphans' Court, so as to obtain a decree for the sale of the lands, when the personal estate is insufficient to pay debts, or for the purpose of making more equal distribution between the heirs. * * By our statute of descents and distribution, the real and personal estates go to the same person, when the debts are paid." By the act of 1839, (Clay's Dig. 199, § 36,) it is made lawful for administrators and executors to rent, at public outcry, the real estate of any decedent, until a final settlement of said decedent's estate is effected, and the proceeds are made "assets in the hands of such executors or administrators." By the act of 1806 (Clay's Dig. 597, § 7)

all such estate, both real and personal, as is not devised or bequeathed in the last will and testament of any person, shall be distributed in the same manner as the estate of an intestate, and *the executor or executors shall administer the same accordingly.*

The former decisions of this court warrant us in stating, that since the enactment of the several statutes above referred to, the law in this State, upon the subject now under consideration, is as we now proceed to lay it down.

The real estate of a decedent, not devised *to his executors*, nor *to* any other person, descends to his heirs-at-law, who instantly are invested with the title, and may exert it, with all its incidents, until the administrator, by actual suit, or in some other legal mode, indicates his intention to assert the power reposed in him by statute. The title or right of the heirs is subject to the exercise of the statute power. If the estate has not been reported insolvent, the administrator may maintain ejectment, or any other suit which may be necessary and proper to regain the possession of the land. As between the administrator and heirs, the latter are not responsible for rents received, or damages, until the statute power is asserted in some lawful mode; on the principle, that in law they are the owners, and may lawfully expend the usufruct, until advised of the necessity to apply it otherwise. This principle, however, will not exonerate any person, except the heirs and those holding rightfully under them, from responsibility to any extent or for any period, to the administrator, for damages, or rents and profits. If the estate has been reported or declared insolvent, no suit *thereafter commenced* by the administrator, to recover possession of the lands, can be maintained. Masterson v. Girard's Heirs, 10 Ala. R. 60; Harkins v. Pope, 10 *ib.* 493; Long v. McDougald's Adm'r, 23 *ib.* 413; Golding v. Golding, 24 *ib.* 122.

As the will of the testator, shown in this case, does not devise his real estate *to his executors*, nor *to any other person*, and as the rents and profits of said real estate, accruing *since his death*, are not disposed of by the will, and as the estate is solvent, it follows necessarily from what is hereinabove contained, that the executors (who have not yet exercised the power to sell the lands, conferred on them by the will) may

maintain any action for these lands, which the administrator of a solvent estate can maintain for the lands of his intestate.

A misjoinder of plaintiffs, in an action like this, will defeat a recovery.—1 Chitty's Pl. 66; Adams on Ejectment, p. 209, and notes.

But there is no misjoinder of plaintiffs in this case. The executors might well join with the tenant in common of their testator.

The charge of the court below is opposed to the law hereinabove stated, and its judgment is therefore reversed, and the cause remanded.

JORDAN'S ADM'R *vs.* HUBBARD AND WIFE.

1. When the defendant pleads not guilty to an action (under the Code) on an open account for services rendered, and judgment is rendered against him on the verdict of the jury, he cannot avail himself of the mispleading on error.
2. Husband and wife may join, under the Code (§ 2131) as at common law, to recover upon a promise made to the wife for services rendered by her during coverture.
3. Section 2490 of the Code applies only to all partial payments, or attempts to avoid the statute of limitations by subsequent undertakings, made since the Code went into effect, but not to verbal promises made previous to that time.
4. In assumpsit by husband and wife, to recover on a promise to pay for services rendered by the wife to the defendant's intestate in his lifetime, it was shown that the intestate, on one occasion, went to defendant's house to get the latter to write his will; but did not find him at home; that on his return he met witness, and, after telling him the object of his visit, stated, 'that he was satisfied he would not live long, and never expected to see B. (defendant) again; that he wanted him (witness) to bear witness that he wished B. to pay Mrs. H. (plaintiff's wife) $500 for the services she had rendered him': *Held*, that this admission was not in the nature of a testamentary bequest, but was a distinct acknowledgment of the services rendered by the wife, and a positive direction to the defendant to pay the specified sum in consideration of them, and was sufficient (before the adoption of the Code) to remove the bar of the statute of limitations.
5. When husband and wife sue jointly for services rendered by the wife during coverture, her admissions of payment cannot be received in evidence against them.

APPEAL from the Circuit Court of Marengo.
Tried before the Hon. ANDREW B. MOORE.

THE facts appear at sufficient length in the opinion.

HENRY C. SEMPLE, for the appellant:

1. The suit, if maintainable at all, can only be maintained by the wife.—Code, § 2131.

2. The wife can only be joined with the husband, in actions for her services, where an express promise has been made to her.

3. The statute of limitations having completed its bar, a partial payment, or express promise in writing, is necessary to take the case out of the statute.—Code, § 2490.

4. The direction to Besteder, through Woodward, to pay plaintiff's wife $500, was in the nature of a testamentary bequest, and did not amount to an acknowledgment of an existing indebtedness.

5. The exclusion of the evidence offered by the defendant, of Mrs. Hubbard's admissions of payment to her by the intestate, was clearly erroneous. The admission of the beneficial plaintiff, of a payment of the debt claimed, is the highest and best evidence of the fact.

WM. M. BROOKS, *contra*:

1. The charge given was correct. The wife rendered the services for which Jordan was indebted. She was the meritorious cause of action, and a direction by Jordan to a third person to pay her for the services, was equivalent to a promise to her.—Brashford v. Buckingham and Wife, Cro. Jac. 77, 205; Morris v. Booth, 8 Ala. 906.

2. There is no error in refusing the first charge asked. The court had already charged the law arising upon the facts of the case, and the charges and refusal to charge must be taken together; and the case stands as if the court, after refusing the charges, had added: "But if Jordan acknowledged an existing indebtedness to the wife, for services rendered by her, and directed her to be paid, that is equivalent to a promise to pay her," &c. Again: the charge prayed was well calculated to mislead, for it is not pretended that the promise was made directly to the wife.

3. The court did not err in refusing the second charge prayed. Jordan died in 1852, and the promise was made before the Code was in force; therefore, neither a promise in writing, nor a partial payment, was essential to take the case out of the statute of limitations.

4. The third charge asked was correctly refused. An acknowledgment of indebtedness by Jordan for services rendered by the wife, with directions or instructions to another to pay the debt for him, was sufficient. No express promise to her in person is required. It is sufficient, if the debtor admits that the wife is the meritorious cause of action, and instructs his agent to pay her the debt. That is equivalent to a promise to her.—St. John v. Garrow, 4 Por. 223.

5. But the defence set up was, "not guilty" and the "statute of limitations." "Not guilty" puts no allegation of the complaint in issue, and did not impose upon the plaintiffs below the duty of proving anything alleged. In order to have put in issue the making of the promise, a special pleading should have been interposed, denying that the intestate promised to pay the wife. In fine, whatever defence is designed to be relied upon, must be specially pleaded.—See Code. The plea of the statute of limitations admitted the cause of action as alleged, and relied upon the matter in avoidance. Under the issues joined, the defendant below was not entitled to the charges asked.—Shaw v. Yarborough, 3 Ala. 588.

6. The declarations of the wife were not admissible.—Perry v. Graham, 18 Ala. 826.

CHILTON, C. J.—Hubbard and wife sued Besteder, as administrator of Henry Jordan, to recover for services alleged to have been rendered by the wife for Henry Jordan, the intestate, in his lifetime, and pending the coverture of Mrs. Hubbard. No pleading, except the complaint, appears of record. In the bill of exceptions, however, it is recited, that the defendant pleaded *not guilty*, and the statute of limitations of three years.

The plea of "not guilty" may be a mistaken recital. No doubt the general issue was designed. Be this, however, as it may, such mispleading is not an error which could avail the party who commits the mistake.—Stone v. Gover, 1 Ala. 287.

The proof conduced to show, that the plaintiff, Mrs. Finnetta Hubbard, had, during her coverture with Wiley Hubbard, rendered services in waiting upon, nursing, and administering medicines to the defendant's intestate, for a period running back some twenty years; and that, before his death, said Jordan said to divers persons, that he would provide for her in his will, if he ever made one. It was proved, that on one occasion the deceased went to the house of Besteder, the defendant, to get him to write his will; that Besteder was not at home, and on his return, deceased met with one Woodward, and told him of his having gone to Besteder's, and the object of his visit,—that B. was not at home,—that he was satisfied he would not live long, and never expected to see Besteder again; "and that he (deceased) wanted him (Woodward) to bear witness that he wanted Besteder to pay Mrs. Hubbard (one of the plaintiffs) five hundred dollars for the services she had rendered him." Neither of the plaintiffs was present at this conversation.

It was also proved by the daughter of the plaintiffs, that she had often heard said Jordan in his lifetime, but not in the presence of either of the plaintiffs, say that he wanted her mother to be paid three hundred dollars, after his death, for the services she had rendered him.

The deposition of the daughter was objected to, upon the ground that the certificate of the commissioner who took it did not conform to the requirements of the law; but no specific objection is made, and we are unable to see any substantial ground of objection to the certificate.

The charge of the court, as based on the foregoing proof, was, "That if the jury believe that there was an acknowledgment of an existing indebtedness, within three years before the institution of this suit, on the part of said Jordan, for services rendered by the plaintiff Finnetta, and that he directed it to be paid to her, then what he said was equivalent to a promise to pay her, although not said in her presence; which promise would take the case without the influence of the statute of limitations, and entitle the plaintiffs to a recovery." This charge was duly excepted to, and the defendant asked several charges, which were refused. The substance of these was—1st, that the subsequent promise, to be availa-

ble as an avoidance of the statute, must have been made to Mrs. Hubbard in person or directly, for services performed by her during the marriage; 2d, that if the jury find there was no subsequent promise to pay in writing, and no partial payment made before the bar of the statute was complete, then the plaintiffs could not recover. The refusal of the court to give these charges was also excepted to.

The counsel for the appellant objects to the charge, because it concedes that husband and wife may join to recover upon a promise made to the wife, for services rendered by her during the coverture. He insists, that the Code gives the action solely to the wife. The right here accrued before the Code went into effect; and as the law then stood, the husband and wife could join, and if the husband died before recovery, the right to prosecute the suit survived to the wife. But concede that the Code controls the remedy; the action is nevertheless well brought. The demand is not the separate property of the wife. She is the meritorious cause of the action, and the promise was made to her; but still, it is but the price of her services, which belongs to her husband, upon his reducing the same to possession, or electing to treat the same as his by certain acts of ownership or dominion over it. Section 2131 of the Code makes no change upon the common law, except in so far as it provides for the maintenance of a suit for or against a married woman, who must sue or be sued alone in relation to her separate estate. By the common law, this suit was clearly maintainable by husband and wife.—Phillis-kick v. Pluckwell, 2 M. & S. 393; Brashford v. Buckingham and Wife, Cro. Jac. 77, in Exchcq.; S. C. in B. R., *ib.* 205; Morris v. Booth and Wife, 8 Ala. 907.

But, it is argued, that the Code (§ 2490) requires that, in order to avoid the bar of the statute, there must be a partial payment made before the bar is complete, or an unconditional promise in writing signed by the party to be charged. So it does in cases to which it applies; but this section was not intended to defeat or take away rights which had vested under the previous law. If, under the previous law, a verbal promise had renewed the demand, so that the obligation to pay was a subsisting valid one, it would be gross injustice upon the rights of parties to sweep them away by a subsequent

law requiring other and higher evidence of their validity.—Whether, indeed, such a law would not violate the spirit of the constitution, as impairing the obligations of the contract, is a question we need not now decide. Certain it is, that such retrospective operation is always dangerous,—is usually regarded odious, and never indulged unless it is clear from the statute itself that such was the design of the Legislature. The general rule is, that laws existing at the time of the contract, govern its *essence* and *extent*; while those existing at the time of seeking to enforce it govern the remedy. But it is not competent to destroy the right, which is the essence of a contract, under the pretext of regulating the remedy, nor to deprive a party of all remedy, which is equivalent to a denial of the right.—1 Bibb 569; 2 *ib.* 202.

In our opinion, section 2490 of the Code applies to all partial payments, or attempts to avoid the statute of limitations by subsequent undertakings, made since the 17th January, 1853, when the Code went into effect, but not to those made previous to that time. Such was the decision of the Court of King's Bench, in Gilmer v. Shuter, 2 Mod. 310; see, also, Huffman v. Huffman, at the present term.

But it is further contended for the appellant, that the admission made by the intestate in this case was not of that character which would remove the bar, and entitle the husband and wife to their joint action—that it was testamentary in its nature, amounting to a bequest, and not to an admission of an indebtedness. We do not think this position tenable. The intestate desired Woodward to bear witness that he wanted Bestoder to pay Mrs. Hubbard five hundred dollars, not as a bequest, nor as a gratuity, but in consideration of or "*for*" the services she had rendered him. Here is a distinct acknowledgment of services rendered by the wife, and a positive direction or request that the defendant below should pay five hundred dollars in consideration of them. An acknowledgment of an indebtedness, and a present willingness or liability to pay, is all the cases require to take the demand without the bar of the statute (Crawford v. Childress, 1 Ala. 482; Townes & Nooe v. Fergusson, 20 *ib.* 147; Ross v. Ross, *ib.* 106; Poole's Ex'r v. Relfe, 23 *ib.* 701); and whether this acknowledgment be made to the creditor, or to

a third person, makes no difference—it is equally operative. St. John v. Garrow, 4 Por. 223; McRea v. Kennon, 1 Ala. 295.

The admissions of the wife, made since the suit was instituted, that she had received pay for the services, &c., were properly excluded. It is well settled, that where the husband sues for the wife's wages, the fact that she earned them does not authorize her to bind him by admissions of payment; nor can her declarations affect him, where he sues with her in her right, for in such cases the right sought to be enforced is his own, though it was acquired through her instrumentality. 1 Greenl. Ev., § 185; Hall v. Hall, 2 Str. 1094; Meredith v. Footner, 11 Mees. & W. 202; Perry v. Graham, 18 Ala. 822-26; 2 Phil. Ev., (C. & H. Notes,) p. 152, note 160.

We perceive no error in the several rulings of the court. Let the judgment be affirmed.

HALEY ET AL. *vs.* CLARK.

1. The power to remit fines and forfeitures is confided by the State constitution to the Governor alone, and cannot be exercised by the Legislature; and therefore any act of the Legislature which attempts, directly or indirectly, to remit a fine, either before or after it has been paid, is unconstitutional.
2. Therefore the act of February 2, 1850, (Pamph. Acts 1849-50, p. 452,) entitled "An act for the relief of the securities of John Douglass, late clerk of the Circuit Court of Marion county", is unconstitutional.

APPEAL from the Circuit Court of Marion.

Tried before the Hon. ALEX. B. CLITHERALL.

THIS was an application for a *mandamus* to the appellee, as county treasurer of Marion county, to compel him to pay to the petitioners (who were Allen Haley, John M. Frederick, John T. Sanders, and Willian Warren) the sum of $500, which he was directed to pay to them by the act of the Legislature, approved February 2, 1850, entitled "An act for the relief of the securities of John Douglass, late clerk of the Circuit Court of Marion county." The petitioners allege that they have done everything required of them by the act, but the defend-

ant refuses to pay, &c. On the filing of the petition, a rule *nisi* was granted against the defendant, who subsequently filed a written answer to the petition, in which, among other things, he demurs to the petition, because it shows on its face that the act under which the petitioners claim is unconstitutional. The court sustained the demurrer, and refused the *mandamus*; and its judgment is now assigned for error.

R. S. WATKINS, for the appellants:

The act under which the appellants claim is not unconstitutional. No one pretends that it is a pardon or remission of a fine or forfeiture. The act itself clearly shows what it is—viz., "an act for the relief" of these sureties; that is, a donation to them, by the State, of a certain amount, upon certain conditions. That it does not divest any vested rights of the county is apparent. It directs the county treasurer to pay to the appellants a certain amount out of the fines and forfeitures now in the treasury, or which may hereafter come into it. Fines and forfeitures belong to the State, not to the county. They are reserved by the State, to be used in the payment of State witnesses, or for other purposes.—Code, §§ 3570, 3618. If they belonged to the county, and not to the State, the county might legally refuse to pay these witness tickets, although required to do so. If the act of 1850, under which appellants claim, is unconstitutional, so is the act requiring the county treasurer to pay State witnesses, upon a failure of prosecution, or where the defendant is insolvent. If, then, fines and forfeitures belong to the State, she had a right (as she has done by the act of 1850) to give a certain amount out of them to the appellants.—4 Watts & S. 401; 1 Humph. 48.

But admitting that fines and forfeitures are donated by the statute (Clay's Dig., p. 296, § 37) to the county, still they do not vest until the rendition of a judgment for them.—Pope v. Lewis, 4 Ala. 487. As a subsequent statute repeals a prior one to which it is repugnant, (3 Ala. 626,) the act of 1850 repeals the former statute, as to judgments rendered since its passage, until this amount of $500 is paid.—3 U. S. Digest, p. 488; 5 *ib.* 811. The Legislature has a right to change a donation to a county before it has been appropriated, or any right acquired under it.—1 Humph. 48; 6 Shep. 109.

TURNER REAVIS, with whom was WM. S. EARNEST, *contra:*

The act upon which the appellants predicate their claim is unconstitutional. Its effect is, to remit the fine which had been recovered against the appellants, and been paid by them; and it was, therefore, a usurpation of power which belonged exclusively to the executive.—Const. Ala., art. IV, § 11; *ib.*, art. II, § 2; 3 Barr 126; 1 Kelly 606; 2 Gill 147; 4 Blackf. 256. If the Legislature can order a fine, which has been paid, to be refunded, it renders the exclusive remitting power of the Governor almost a nullity; for, after the Governor has refused to remit, and the fine has been paid, the Legislature may order it to be refunded, which, in effect, is exercising the pardoning power after the Governor has refused to exercise it.

The fine belonged to Marion county. It had been paid, and constituted part of the county fund for the payment of county debts.—Clay's Dig., p. 249, § 10; *ib.* 296, § 37; *ib.* 330, § 99; *ib.* 142, § 1; *ib.* 578, § 12. It was, therefore, a vested right, which neither the Governor nor the Legislature could take away.—7 J. J. Mar. 645; 1 Kelly 606.

GOLDTHWAITE, J.—The appellants claim under a private act (Acts 1849-50, p. 452), by the first section of which it is enacted "that the treasurer of Marion county be, and he is hereby directed to pay Allen Haley, John M. Frederick, John T. Sanders, and William Warren, the securities of John Douglass, late clerk of the Circuit Court of Marion county, the sum of five hundred dollars, that being the amount of a fine which they have paid for said Douglass, in consequence of said Douglass having failed to comply with the requisitions of the second section of the act of 1834." The second section provides for the payment of the amount out of the funds of the county, arising from fines and forfeitures, upon making it appear that they have paid off and settled the fine, and all costs and damages in relation thereto, and also that Douglass has accounted for and paid all public moneys for which he as such clerk was liable.

The principal question is, whether this act is unconstitutional. By article IV, section 11, of the constitution of Alabama, the power to remit fines and forfeitures is given to the Governor, and by the second article, the powers of the gov-

ernment are divided into three distinct departments—the legislative, executive and judicial, and no one of these departments, or person belonging thereto, can exercise any power properly belonging to either of the others, unless expressly directed or permitted by the constitution. The power to pardon offences, except in case of treason and impeachment, and to remit fines and forfeitures, being, as we have seen, confided by the fundamental law to the executive branch of the government alone, this power is virtually denied to any other department, and cannot, therefore, be exercised by the Legislature. The only question is, whether the act referred to is, directly or indirectly, an attempt to remit a fine; for if it be so, the mode or manner in which it is to be done is entirely immaterial. It is the right which the constitution denies, without reference to the mode in which it may be exercised. We regard the act in question as a donation to the parties therein named of the amount of a fine which had been imposed on them in pursuance of law, upon making proof to the treasurer that they had paid it. A pardon is nothing more than relieving one from the penalty which the law has placed him under, and has the effect of restoring him to his condition before conviction.

It is impossible for any one to read the first section of the act, without seeing that its purpose is identical with a pardon. The plain intention is, to relieve the parties against a fine which the law has imposed on them—to place them, by the re-payment of the money, in the same condition they occupied before conviction; and this being the case, it matters not whether the act is passed before or after the fine is paid. It is the substance of the thing we must look at; and certainly it never could have been the intention of the framers of the constitution, to prohibit the Legislature from remitting a fine, and yet allow that body to accomplish the same result by compelling the fine when paid to be refunded. If that could be done, the prohibition would be nugatory. The Governor might refuse to pardon, and the Legislature direct the treasurer to pay the party the amount of his fine. We can see no real difference between the two cases. If the Legislature have the right to give away the public money—in relation to which we say nothing—they at least have not the constitu-

tional right to give it for the purpose of enabling an offender to relieve himself against a fine; and if that purpose appears upon the face of the act, courts could not do otherwise than declare it invalid. This is the case here; certain parties have been fined; it is not pretended the fine has been remitted by the Governor; it is conceded that the Legislature has not the authority to remit; but after payment, it is insisted, that body may legitimately refund the fine. To sustain this position would be to allow one department of the government to trench upon the powers of another, and to defeat the purpose which the constitution contemplated in confining the pardoning power to one branch of the government, by permitting it to be indirectly exercised by another.

The act we have considered being void, the judgment of the court in refusing to sustain any legal proceeding based upon it was correct.

Judgment affirmed.

STILES & CO. *vs.* LIGHTFOOT ET AL.

1. A voluntary conveyance, as against existing creditors, is absolutely void; but to avoid it as against subsequent creditors, it must be shown to have been made with a fraudulent intent.
2. And where a subsequent creditor takes a mortgage to secure his debt, but does not incur any new responsibility for it, nor waive any right or lien, nor part with anything to obtain it, he is not entitled to relief in chancery against a previous voluntary conveyance of the same property, without averring and proving that such conveyance was made with a fraudulent intent.
3. The evidence in this case held insufficient to establish a fraudulent intent in the execution of the voluntary conveyance, on the ground that fraud cannot be imputed to any one when the facts and circumstances out of which it is supposed to arise may well consist with honesty and purity of intention.
4. A correct decree, though rendered for a wrong reason, will be affirmed on error.

APPEAL from the Chancery Court at Wetumpka.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by the appellants, to foreclose a mort-

gage on certain town lots in the city of Wetumpka, executed to them by one William B. Maxwell, on the 29th November, 1845, to secure the payment of a promissory note which he owed them for $476 38, dated October 25, 1845; and also to set aside a deed of trust dated January 28, 1845, by which the said Maxwell conveyed the same lots to one Allen Lightfoot, as trustee for his wife. The appellants claimed to be creditors and *bona fide* purchasers for valuable consideration, and alleged that the said deed was fraudulent and void as to them. The defendants set up the deed in their answers, and denied all fraud in its execution, either in law or in fact.

The chancellor dismissed the bill, but without prejudice; holding, that the complainants were not *bona fide* purchasers, and that they could only claim as creditors at large who had not exhausted their legal remedies; and his decree is now assigned for error.

N. S. Graham, for the appellants, contended, that the deed was fraudulent and void, both as to subsequent purchasers and creditors; and cited the following authorities: Thomson v. Dougherty, 12 Serg. & R. 448; Anderson v. Roberts, 18 Johns. 526; Townshend v. Williams, 2 Vez. 11; Poigne v. Snowden, 1 Dess. 591; Fonb. Eq. 217 to 224, and notes; Henry v. Fullerton, 13 Sm. & Mar. 631; Cordery v. Zealy, 2 Bail. 205; Smith v. Henry, *ib.* 118; 2 Kent's Com. 441, note; Beach v. Catlin, 4 Day's R. 284; Merrill v. Meachum, 5 *ib.* 341; Roberts on Conveyances, p. 521, note; *ib.* 596; McGuire v. Miller, 21 Ala. 394; Stokes v. Jones, *ib.* 738; same case, in 18 *ib.* 737.

White & Parsons, *contra*, cited Walker v. Miller, 11 Ala. 1081; Dickerson v. Tillinghast, 4 Paige 215; 2 *ib.* 300; 3 How. U. S. R. 333; 1 Dev. Eq. 103; *ib.* 163; 1 Story's Eq. 416; Conprew v. Arthur, 13 Ala. 525; 5 Peters 264.

RICE, J.—In this State, the law is settled, that a voluntary conveyance, as against existing creditors, is absolutely void; but that to avoid it as against subsequent creditors, it must be shown to have been made with a fraudulent intent. Thomas v. Degraffenreid, 17 Ala. 602.

The appellants are subsequent creditors. Their debt was

created on the 25th day of October, 1845, and is evidenced by a promissory note executed on that day. On the 29th November, 1845, they obtained from their debtor a mortgage to secure the payment of their said debt. They did not take the mortgage in satisfaction of any debt, nor incur any new responsibility for it, nor waive any right or lien, nor pay or part with anything to obtain it; but they took the mortgage as a mere security for the precedent debt. Their claim is opposed by a voluntary conveyance of the same real estate embraced by the mortgage, executed by their debtor on the 28th January, 1845, to Allen N. Lightfoot, as trustee, for the wife of said debtor. The voluntary conveyance is an absolute conveyance, and is for the separate use of the wife; and under the frame of appellants' bill, and their admission made at the hearing, the said voluntary conveyance must be regarded as having been duly recorded in the proper office on the 25th February, 1845.

Upon such a state of facts, it is clear that the appellants are not entitled to relief in chancery, without averring and proving that the prior voluntary conveyance was executed with a fraudulent intent.—Donaldson v. The Bank of Cape Fear, 1 Dev. Eq. R. 103; Dickerson v. Tillinghast, 4 Paige's Ch. R. 215; Nolen v. Gwynn, 16 Ala. 728; Coddington v. Bay, 20 John. R. 637.

The bill alleges that the voluntary conveyance was executed with such fraudulent intent; and if that allegation had been proved, the appellants would have been entitled to a decree. Corprew v. Arthur, 15 Ala. 525. But in our opinion, the evidence fails to show any such fraudulent intent. The law does not allow us to impute fraud to any party, when the facts and circumstances out of which it is supposed to arise may well consist with honesty and purity of intention.—Smith v. Br. Bank at Mobile, 21 Ala. 125; Henderson v. Mabry, 13 *ib.* 713; Ravisies v. Alston, 5 *ib.* 297.

The ground upon which the chancellor dismissed the bill, is not defensible. The cause was submitted for final decree on the pleadings and proof, and the bill was dismissed without prejudice to the right of complainants to file another. This decree, being right, although rendered for a wrong reason, must be affirmed.—Evans v. Gordon, 8 Porter's R. 142.

MANNING *vs.* JOHNSON.

1. Although the deed of an infant is voidable only, and not absolutely void, yet he will not be required, in a court of law, to refund the purchase-money, when it is not shown to have been in his possession, either actually or constructively, after he attained his majority, as a pre-requisite to an avoidance of his deed by suit for the land.
2. After a recovery of the land by the infant, in such case, the purchaser may recover back the money by suit, especially where he was induced to enter into the contract by the infant's false representation that he was of full age.
3. *It seems*, however, that if the infant, after he arrives at full age, is possessed of the consideration paid him, whether it be property, money, or choses in action, and either disposes of it so that he cannot restore it, or retains it for an unreasonable length of time, this amounts to an affirmance of his contract.

APPEAL from the Circuit Court of Sumter.
Tried before the Hon. ALEX. B. CLITHERALL.

TRESPASS QUARE CLAUSUM FREGIT by Pierce Manning against Robert Johnson, to recover two town lots in Livingston, together with damages for their detention.

"On the trial of the cause," as the bill of exceptions states, "it was proved that the plaintiff, being the owner of the premises sued for, and an orphan, sold said premises to the defendant, and conveyed the same to him by deed, with warranty of title, in the usual form, which deed recited the consideration to be nine hundred dollars, received by plaintiff from defendant. The evidence conduced to show, also, that the purchase money recited in the deed had been paid by the defendant while the plaintiff was under the age of twenty-one years; also, that at the time the conveyance of the said premises was made by plaintiff, he was an infant under the age of twenty-one years; also, that this suit was commenced by plaintiff, to recover said premises, immediately after attaining the age of twenty-one years, the defendant being in possession thereof, and having received the possession from plaintiff at the time said conveyance was made to him. There was evidence, also, tending to show that plaintiff represented himself to be of age, and claimed to act for himself, and had voted at an elec-

tion; and that defendant, at the time of purchasing, was to some extent a stranger. There was no evidence that plaintiff had returned, or offered to return, the purchase money received by him from the defendant.

"Upon these facts, the question was, whether plaintiff could recover without having shown a return, or an offer to return, the purchase money which he had received from the defendant for the premises sued for. The court charged the jury, that if they believed from the evidence that plaintiff, at the time he sold and conveyed the premises to the defendant, was an infant under the age of twenty-one years, but that the contract between them was executed—that is, that the purchase money was paid by the defendant, and the possession, with the deed, delivered up by plaintiff—then, to entitle plaintiff to recover in this action, he must have re-paid, or offered to repay, the purchase money to the defendant; and to this charge the plaintiff excepted."

This charge of the court is now assigned for error.

TURNER REAVIS, for the appellant:

1. In this State, infants have always been prohibited by statute from conveying their lands, either by deed or will. The ordinance of 1787, for the government of the territory northwest of the Ohio, provides, that real estates may be conveyed, or devised, by the person in whom the estate may be, being of full age, under certain formalities.—1 U. S. Stat. at Large, p. 51, note (a); Toulmin's Dig., p. 882. This ordinance, with the exception of the anti-slavery article, was extended to the Mississippi Territory, by the act of 1798, (1 U. S. Stat. at Large, p. 550, §§ 3 and 6); and was continued in force in the Alabama Territory, upon its establishment in 1817.—3 U. S. Stat. at Large, p. 372, § 2; Toulmin's Dig., p. 882. It was also continued in force, so far as it remained unchanged, when the territory was formed into a State government.—Constitution of Ala., sec. 5th of the schedule. No change was made in the ordinance, so far as it respects conveyances, until 1803.—Note to page 234 of Toulmin's Dig. And no change in it has ever been made, removing the restriction upon conveyances by infants. On the contrary, all the legislation upon the subject of conveyances, either as-

sumes that the restriction continues, or expressly continues it. Toulmin's Dig., 234, § 3; *ib.* 883, § 2; Clay's Dig. 155, § 27; *ib.* 596, § 1; Code of 1852, § 1265. The ordinance of 1787, then, is the foundation of the right to convey lands in this State; and as that ordinance expressly excludes infants from the exercise of the right, and in this respect has never been changed, their conveyances are void. That the proper construction of the ordinance prohibits infants from conveying their lands, see Smith's Com. on Statutes, §§ 488 and 581; 4 Day's R. 60.

This view is not in conflict with any of the cases decided by this court, and was not presented in any of them.

It is also insisted, that independently of the statutes referred to, the deed of an infant is void at common law, if he choose so to consider it. The case in 4th Porter 41, is to this effect; but in 5th Porter 270, and in 10th Ala. 354, the question is expressly left open; and, so far as a conveyance in fee is concerned, is not settled in the case of Weaver v. Jones, 24 Ala. 420. The case in 5th Porter 270 decides, that the deed of an infant, conveying his lands, is void as against his guardian. How could it be so, without being void as to the infant also? If the deed of an infant, having a guardian to protect him against his own weakness and indiscretion, is void, much more should the deed of one having neither guardian, nor father, nor mother, (as in this case,) to afford him such protection, be so. That such a deed is void at common law, see 1st Thomas's Coke, 1st Am. edit., top p. 205, and note 41; also, top p. 209, and note 1; 3 Mod. R. 209, 303-4, 310; Holt 357; 5 Bac. Ab. 98; 4 N. Hamp. 441; 12 Serg. & R. 399; 9 Barr 14; 2 Dev. & Bat. 320.

All the cases which hold the deed of an infant to be voidable only, rest upon the *dicta* of Lord Mansfield, in Zouch v. Parsons, 3 Burr. 1794; and while the decision on the precise point before the court in that case has ever since been adhered to, the *dicta* have been questioned by many eminent judges and lawyers, and rejected by many others.—10 Ala. 354; 2 Dev. & Bat. 320; 10 Peters 58; 1 Thomas's Coke, 1st Am. edit., 205, top p., and note 41; 2 Lomax's Dig. 11, § 8; 2 Prest. on Convey. 249.

2. It is not material, however, whether Manning's deed to

Johnson was void, or voidable; for if merely voidable, it was not necessary, as a condition precedent to commencing his suit, that he should have restored to Johnson what he had paid him. In reference to this question, it may be premised, that infants are greatly favored by the law, and are regarded by it with paternal solicitude; and they are not allowed to be prejudiced by anything to their disadvantage.—9 Vin. Ab. 374; 5 Bac. Ab. 110 (G); *ib.* 125; 8 Peters 128. They are even more favored than married women.—Hob. R. 225. And this favor is extended for the purpose of protecting them against the consequences of their folly, rashness, misconduct, and fraud.—10 Peters 77; 12 Serg. & R. 403; 1 Johns. Ca. 128; 4 Sanf. Sup. C. Rep. 374.

All the courts which have held the deed of an infant to be merely voidable, have also held, that he may avoid it on arriving at full age, by entry, by suit, or by conveying the land to another person; and that if he should die before avoidance or confirmation, his heirs may avoid it in the same way. 3 Burr. 1794; 10 Peters 58; 11 Johns. 539; 17 Wend. 119; 7 Blackf. 442; 12 Missouri 549; 15 Ohio 156; 30 Maine 354; 7 Humph. 121; 5 Ohio 253; 2 Dev. & Bat. 320; 2 Litt. 157; 3 Brev. 401; 2 Kent's Com., 6th edit., 236-7-8; 4 Porter 41.

If the act of avoidance is completed in any of these ways, then of course nothing else is necessary to be done; and consequently, it is not necessary to restore the consideration in order to effect it. In many cases restitution would be impossible. If an infant were to convey his land for something which was destroyed before he arrived at full age, so that he could not return it, he could never recover his land, however great the disproportion between the value of his land and what he got for it, if, in order to recover it, he should be required to restore the thing he got.

The courts which have held the contracts of infants to be merely voidable, place their decisions on the ground of favor and advantage to the infant.—See the cases cited above, and 24 Ala. 420; Bingham on Inf. 14 and 15. They therefore do not mean by so holding to put an infant in a worse condition than he would be in if his contract were held void; yet such would be the effect of requiring him to restore what he had got for his land, before allowing him to recover it back. Such

a requisition would be, not to favor him, but to put him almost upon the same footing with an adult person. No case can be found, where an infant who had sold his land was required, before being allowed to recover it back, to convey it to another person, or enter upon and hold it, to restore what he got for it at law. On the contrary, there are cases in which restitution was expressly held to be unnecessary.—15 Ohio 156; 9 Conn. 330; 16 Maine 55; 12 Serg. & R. 399.

All the cases seemingly adverse to this view, except one, are cases in which personal property was concerned; and in which the rule, that infants are regarded by the law with great favor and paternal solicitude, was lost sight of. The excepted case was one in which the infant sought a rescission of the contract in equity; and the court, acting upon its peculiar principles, refused relief without restitution.—5 Humph. 70. That case, therefore, has no application to this.

The question of fraud on the part of Manning does not arise upon the record; but if it did, the authorities are almost, if not quite unanimous, that the representation of Manning that he was of age does not preclude him from avoiding the deed.—1 Johns. Cases 127; 10 N. Hamp. 184; 10 Peters 77; 4 Sanf. Sup. C. Rep. 374; 12 Serg. & R. 403.

A. A. COLEMAN, *contra*:

The modern and most approved doctrine is, that all the acts and contracts of an infant are voidable, and not absolutely void; with, perhaps, the single exception of a power of attorney. The most that can be said in support of the position, that their contracts are void, is, that the law regards them as incapable of making good bargains; and if such be the case, surely the law will not, against their consent when of full age, deprive them of the benefit of a good bargain, and refuse to allow them to ratify those acts which are greatly to their advantage. The ordinance referred to by the appellant's counsel, is not prohibitory, and does not apply to this case. The doctrine contended for is nothing less than a complete acknowledgment of the doctrines of the feudal system, which is not recognized in this country.—4 Kent's Com. 440; 2 *ib.* 233, 234; Smith on Statutes, §§ 577, 528, 620, 621; Reeves on Domestic Relations, ch. 4 and 5; Zouch v. Parsons,

3 Burr. 1794; 17 Wend. 119; 15 Mass. 220; 13 *ib.* 371; Kline v. Bell, 6 Conn. 494; 10 Ala. 348; Weaver v. Jones, 24 *ib.* 420; 10 Peters 58; 4 Port. 41; 5 *ib.* 270.

If an infant (or, rather, one who claims relief on the ground of infancy) would avoid an executed contract, he must restore the consideration which he has received.—2 Kent's Com. 240; 1 N. Hamp. 73; 6 *ib.* 335; 10 *ib.* 194; 15 Mass. 359; 13 *ib.* 204; 3 Verm. 353; 9 *ib.* 368; 12 *ib.* 28; 14 *ib.* 405; 6 Greenl. 89; 8 *ib.* 405; 8 Taunt. 508; 5 Humph. 70; 7 Cowen 179; 11 Wend. 85; 13 Ala. 419.

But if the general proposition cannot be sustained, when stated thus broadly, then it is insisted, that if an infant retains, after arriving at full age, and converts and appropriates the money to his own use, he is estopped from setting up his infancy, and cannot recover.—Thomason v. Boyd, 13 Ala. 419; 7 Ired. 258; 11 Wend. 85; 12 Serg. & R. 399; McPherson on Infancy, p. 309 (mar. 488.)

CHILTON, C. J.—It is now the settled doctrine, that the deed of an infant is not void, but voidable only.—Reeves' Dom. Rel., p. 250, *et seq.*; Zouch v. Parsons, 3 Burr. 1794; Elliott v. Horn, 10 Ala. 348-54; Weaver v. Jones, 24 *ib.* 420.

Ordinarily, it is the privilege of an infant to rescind his contract at pleasure; and this, without regard to whether such contract was a fair one or not. This general rule is subject to certain exceptions; but these are not involved in the case before us, unless his failure to return the purchase money, which he has received in consideration of the sale and conveyance of his land, deprives him of the power of rescission.

Upon this subject we have carefully looked into the books, and find much conflict of authority; and, without, in this place, commenting upon them, we state as our conclusion, that while we fully subscribe to the doctrine that the infant must use his privilege as a shield to defend himself, and not as an offensive weapon to injure others, we cannot subscribe to the doctrine that he must refund the purchase money which he has received, and which there is no evidence he has had in his possession after he attained his majority, as a condition precedent to his rescinding or avoiding his conveyance *at law*. We agree, that the strong current of authority is otherwise

in a court of equity; but we express no opinion now as to the rule that court should proceed upon in such cases.

The effect of the ruling of the primary court is, to turn this conveyance into a *quasi* mortgage, and to allow the infant the mere right of redeeming his land upon re-payment of the sum advanced to him. But, we apprehend, if the parties had expressly contracted for that relation, the infant would not have been held concluded by the mortgage. Mr. Coote, in his work on Mortgages, (p. 105,) says: "With respect to infants, they are of course incapable of executing a mortgage of their own property, or of lending money on mortgage; nor has the guardian, or trustee, nor even the court of chancery, any power to change the nature of the infant's estate", &c.—1 Pow. on Mortg. 58-9.

When we come to reason upon the proposition, however, it is surrounded with difficulty; for, if the infant can raise money to the whole value of his estate by a voidable sale or mortgage, and can only avoid the conveyance after refunding, he is furnished the means of indulging habits of dissipation and prodigality, which in many instances would doubtless result in squandering the whole of the proceeds; while the purchaser, or mortgagee, would risk nothing, the land or estate of the infant so sold or mortgaged furnishing adequate security. On the other hand, to allow the infant to retain the consideration, and yet to repudiate or disaffirm the conveyance, would tempt as well as enable him to practice frauds upon others. We think the safe rule should furnish a check both upon the infant and the party contracting with him. That rule we take to be this: If the infant, after he arrives at age, is shown to be possessed of the consideration paid him, whether it be property, money, or choses in action, and either disposes of it so that he cannot restore it, or retains it for an unreasonable length of time after attaining his majority, this amounts to an affirmance of the contract. So, likewise, if it be shown that he has the power to restore the thing that he received, he cannot be allowed to rescind, without first making restitution. But if, as in the case before us, the consideration paid was money, and there is no proof that he was possessed of the money so obtained, either actually or constructively, after he attained his majority, so as to be able to restore it

to the purchaser, the infant shall not be required, in a court of law, to re-pay the amount he received, as a pre-requisite to an avoidance of his deed by suit for the land. When he succeeds in recovering the land, it works the destruction of the contract; and according to the more modern authorities, which we are disposed to consider as correct, the purchaser who has lost the land may sue for and recover the money; and especially would this action lie in a case like this, where the purchaser was induced to enter into the contract upon the false representations made by the infant, that he was of full age, and consequently competent to contract. We would not be understood as intimating, that if the infant sought a rescission in a court of equity, he would not be required to refund the purchase money, whether he had disposed of it or not before he arrived at lawful age. See, upon this subject, Dart on Vendors and Purchasers of Real Estate, p. 3; Chambers on Infancy, p. 412; 1 Fonb. Eq., b. 1, ch. 3, § 4, and authorities on the briefs of counsel.

Let the judgment be reversed, and the cause remanded.

McALLISTER ET AL. *vs.* McDOW.

1. The statute which provides that, "in all actions to recover damages for torts, the plaintiff shall recover no more costs than damages where the damages do not exceed five dollars, unless the presiding judge shall certify that greater damages should in justice have been awarded," (Clay's Digest, p. 316, § 25,) does not apply to an action of debt on an attachment bond to recover damages for the wrongful and vexatious suing out of the attachment.
2. The overruling of a motion to nonsuit the plaintiff, when the verdict in his favor is for a less sum than the court can take cognizance of, on the ground that his affidavit does not comply with the requisitions of the statute, (Clay's Digest, p. 325, § 75,) is not revisable on error.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. GEO. D. SHORTRIDGE.

DEBT on an attachment bond, by Arthur McDow against

Barnabas G. McAllister and Thomas P. Crawford, to recover damages for the wrongful and vexatious suing out of the attachment. The jury rendered a verdict in favor of the plaintiff, on issue joined, "for one dollar and seventy-five cents, besides costs"; and the defendants thereupon moved the court, "1st, to enter up judgment against them for no more costs than the sum of the verdict"; and, "2d, that no judgment be rendered against them on said verdict, unless the plaintiff file the affidavit in such case required by the statute, where the recovery is less than fifty dollars." The affidavit filed by the plaintiff states, "that the sum really due him, on the matter sued on in this case, at the time of the bringing of the suit, exceeded fifty dollars; and that the injury incurred by him, by reason of the unwarrantable and unjust proceeding complained of in said suit, did in fact exceed the sum of fifty dollars; but that from the nature of the case, and after the lapse of time when said cause was tried, he could not make proof thereof, and for the want of proof he failed of recovering for the actual damage he had received."

The court overruled both these motions, and rendered judgment against the defendants for full costs; to which rulings of the court the defendants excepted, and which they now assign for error.

E. W. Peck, for the appellants:

1. The suing out of an attachment wrongfully or vexatiously is a tort, and an action to recover damages for it, whether in form debt or covenant on the bond, or case, is an action to recover damages for a tort; and if the damages recovered do not exceed five dollars, the plaintiff can have judgment for no more costs than damages, unless the presiding judge certifies that greater damages ought to have been awarded. Clay's Digest, p. 316, § 25; Hill v. Rushing & Wood, 4 Ala. 212. The condition of the bond is, to pay such damages as the defendant may sustain by the wrongful or vexatious suing out of the writ; and a recovery, in such cases, properly is, the damages sustained, whether the action be debt, covenant, or case; and such is the judgment in this case.—4 Ala. 212, *supra*. An action to recover the penalty for the violation of

a statute, is, in form, debt; yet it is manifest, in such a case, that the recovery is for a tort.

2. If the foregoing point is not well taken, then it is insisted, that the court should have nonsuited the plaintiff below, as the affidavit filed does not come up to the requirements of the statute.—Clay's Digest, p. 325, § 75.

W. Moody, *contra*:

1. This is not such a suit as is contemplated by the statute which allows no more costs than damages. It is an action of debt, founded on the defendants' bond, conditioned to pay all such damages as the defendant in attachment might sustain by the wrongful or vexatious suing out of the attachment. Though the transaction grew out of the wrongful act in suing out the attachment, yet this suit is brought to recover for the failure "to pay the damages." The allegation that the attachment was sued out wrongfully, is a statement of the facts, by way of recital, out of which arose the obligation to pay the damages; but the true breach, without which the declaration would be demurrable, is, that the damages were not paid. The statute would as well apply to a suit on an administrator's bond, suggesting a *devastavit;* or to a suit on a covenant with a lessee for quiet enjoyment, after entry and expulsion by the covenantor; or to a suit on any covenant not to do a particular thing. The surety could not be sued otherwise than on the bond.

GOLDTHWAITE, J.—The principal question in this case is, whether the act of 1839 (Clay's Dig. 316, § 25) applies to an action brought on an attachment bond for wrongfully and vexatiously suing out an attachment. The statute is confined by its terms to "actions brought to recover damages for torts"; and as the law of costs is penal (Clay's Dig. 239, § 12), it must be strictly construed. For the appellant it is insisted, that the suit in the present case, though based upon a contract, is in reality an action to recover damages for a tort; and in one sense it certainly is, for no action could be sustained on the contract, if the wrong had not been perpetrated: but we apprehend, the true criterion is, whether the tort is simply the incident, or the real foundation of the action. In

the suit on the attachment bond, the wrongful act is necessary to be proved; but it is only essential as the medium by which the breach of the contract is to be ascertained, and the quantum of damage determined. The action cannot properly be said to be founded on the wrong, for it can be brought against the surety alone, who may have had no participation in it; and if it is founded on a contract as to him, it cannot be otherwise as to his principal.

The overruling the motion to nonsuit the plaintiff below, under the act of 1807, (Clay's Dig. 325, § 75,) was a matter within the discretion of the court; and as there is nothing in the record to show it was improperly exercised, we cannot say there was error in the action of the judge in this respect. Cummings v. Edmundson, 5 Port. 145; Tippin v. Petty, 7 *ib.* 441; Ainsworth v. Partillo, 13 Ala. 460.

Judgment affirmed.

PRATER ET AL. *vs.* STINSON AND WIFE.

1. An administratrix having received money, "to which plaintiff was entitled as one of the distributees of the estate, all the other distributees having received their respective shares", let her husband have some of it, at his request, to lend to another person; her husband loaned it out accordingly, taking a note payable to himself, which he "deposited with his said wife for the use and benefit of plaintiff, that she might get the money"; after his death, his executors demanded and received from her the said note and the money on hand, with notice that they belonged to plaintiff and not to their testator, and subsequently collected the money due on the note: *Held*, that plaintiff might maintain an action at law against them for the money thus received and collected, and that satisfaction of the judgment recovered against them would be an extinguishment of the debt due from the administratrix.

APPEAL from the Circuit Court of Benton.

Tried before the Hon. THOMAS A. WALKER.

THIS action (William Stinson and Nancy his wife against James Prater and Andrew J. Prater) was commenced by summons and complaint, to recover of defendants "two hundred

and thirty dollars with interest, for so much money of plaintiffs' delivered to defendants by Jane Prater in the year 1850; also, for so much money received by defendants from Robert McCain for the use of plaintiffs, together with interest on said sum from the year 1850." The defendants pleaded, 1st, the general issue; and, 2d, "that the money mentioned in plaintiffs' complaint was received by them as executors, and plaintiffs' demand was not presented within eighteen months."

On the trial, as appears from the bill of exceptions, "the plaintiffs introduced as a witness one Jane Prater, who proved, that some five or six years since she, as administratrix in South Carolina of her former husband's estate, received two hundred and thirty dollars, to which plaintiff was entitled as one of the distributees of said estate, all the other distributees having been paid their respective portions; that she loaned one Dowdle ten dollars of said moneys, and took his note, payable to herself; that at the time she received said moneys, she was the wife of one John Prater, and had been married to him some two or three years before that time; that she let her said husband (Prater), at his request, have one hundred dollars of said moneys, to be loaned to one Robert McCain; that he (Prater) loaned said one hundred dollars to said McCain, and an additional one hundred of his own, took the note payable to himself, and deposited said note with witness for the use and benefit of said plaintiff, so far as the one hundred dollars is concerned, that she might get the one hundred dollars from McCain; that after the death of said John Prater, in 1850, the defendants, while his executors, having qualified as such on the 10th October, 1850, took an inventory of his estate on the 17th October of that year, and on that day demanded and received from witness, as such executors, said one hundred dollar note on McCain, said ten dollar note on Dowdle, and one hundred and twenty dollars in money, (said sum being the money above specified, which had been in her possession all the time.) Witness informed and notified defendants, at the time, that said money and notes belonged to plaintiff, and not to Prater's estate. It was also proved, that since that time, and before this suit, defendants had collected said two hundred dollars from said McCain.

"This was, substantially, all the proof in the case; and

there being no conflict in the evidence, the court charged the jury, that if they believed the evidence, they must find for the plaintiffs; to which charge the defendants excepted."

The charge of the court is now assigned for error.

MORGAN & MARTIN, for the appellants:

The administrator is the sole representative of the personalty which belonged to the intestate. The legal title vests in him, and all actions relating to it must be prosecuted by him. 1 Wms. Ex., top pp. 567-8; Snodgrass v. Cabiness, 15 Ala. 160; Upchurch v. Norsworthy, *ib.* 705. The action for money had and received for the use of the intestate in his lifetime, or for the use of his estate after his death, can only be maintained by his administrator.—1 Wms. Ex., pp. 568-9; 2 Durn. & E. 848; 2 B. & C. 647. At common law, a distributee could not maintain this, or any other action at law, for his distributive portion, even where there was an express promise.—2 Wms. Ex. 1185; 3 Durn. & E. 690. How then can it be said, that he may maintain such an action against a third person, who may happen to be in possession? In a court of law, he must be regarded as a mere stranger: he has no legal title, and can obtain no standing in court. The statement of the witness, that this money belonged to the plaintiffs, is but her legal conclusion; and the facts stated by her, upon which she based her conclusion, show it to be erroneous.

Upon the marriage of the administratrix with Prater, the latter became administrator in right of his wife. The money was received after this marriage, and vested at once in the husband, especially as he exercised his rights over it by lending it out, and taking the note payable to himself; and it was, therefore, properly passed to his executors. This administration was in South Carolina, where the common law is presumed to prevail.—1 Wms. Ex. 597-8; 2 *ib.* 630-32; Ankerstein v. Clarke, 2 Durn. & E. 330. The law never implies a contract to pay money, unless it originally, or at the time of suit brought, belonged to plaintiff. He must show a legal title to some particular and specific sum: the law cannot imply a promise in favor of one who has not the legal title.—1 Chitty's Pl. 353; Thurston v. Mills, 16 East's R. 254; Whitehead v. Peck, 1 Kelly's R. 140. While the relation of admin-

istratrix existed, the funds in the hands of the administrator were in the nature of trust funds; and even a final settlement would not transfer to the distributees the title to any particular sum of money remaining in his hands. If the money, while in the situation in which it was found by the appellants, had been burned, or destroyed in any other way, the debt from the administratrix to the distributees would not have been thereby discharged; or if it had been property, and a trespass had been committed on it, the distributees could not have maintained any action for the injury. How then can it be said, that they have such an interest as will entitle them to recover the proceeds of the property, or the money itself? Dulany v. Dickerson, 12 Ala. 601; Thompson v. Spinks, *ib.* 155.

Another insuperable objection to a recovery is this: The appellants demanded and received the money and notes in the capacity of executors, as a portion of the assets of their testator's estate, without even a request from the party paying it that they would hold it for, or pay it to the plaintiffs. An assent on the part of the appellants, express or implied, to hold the money for the plaintiffs, or that they had received it for their use, is indispensable: in no other way can a privity between them be created. Such assent is here expressly negatived, and against it there can be none by implication.—Williams v. Everett, 14 East's R. 581; Whitehead v. Peck, 1 Kelly's R. 140; Weston v. Barker, 12 Johns. 276; 2 Greenl. Ev., § 119; 1 Chitty's Pl. 353.

M. J. TURNLEY, *contra*:

Under the facts shown by the bill of exceptions, the plaintiffs were, *ex æquo et bono*, entitled to the money received by the defendants, and might therefore recover it in this action. In cases of such implied contracts, the law creates both the privity and the promise.—Hitchcock v. Lukens, 8 Port. 338; 2 Black. Com. 443; Parsons on Cont., p. 4.

RICE, J.—If goods be delivered to A to deliver to B, the latter may support the action of detinue, the property being vested in him by the delivery to his use.—1 Chitty's Pl. 122, note (n).

Upon the same principle, if money be delivered to A for

the use of B, the latter may maintain assumpsit for its recovery, against A, or against any one who receives it from A with notice of B's right to it. So, if a promissory note is delivered to A for the use of B, and C afterwards, with notice of B's right thereto, procures the note, and collects the money thereon, B may maintain assumpsit against C for such money. Hitchcock v. Lukens, 8 Port. 333; Mardis v. Shackelford, 6 Ala. 433; Gayle v. Benson, 3 *ib.* 234; Burdine v. Roper, 7 *ib.* 466; Reavis' Dig. 83, §§ 2-5.

Upon the facts presented in the bill of exceptions, the appellants have no right to the money sued for, either as individuals, or as executors of the last will and testament of John Prater. The money is not assets of the estate of their testator, and they are not bound to account for it as assets. They are liable as individuals for it, to the appellees, who are its owners.—Burdine v. Roper, 7 Ala. 466.

It may be conceded, that the strict legal title to this money was once in Jane Prater, as administratrix of her first husband in South Carolina. But she proves that the wife of Stinson was entitled to it, as one of the distributees of the estate of the said first husband, and that all the other distributees had been fully paid their several distributive shares. She also proves other facts, which show that it is by *her own acts*, in connection with the right of Mrs. Stinson as a distributee, that the appellees (Stinson and wife) have acquired the right to recover this money in satisfaction (either total or partial) of Mrs. Stinson's distributive share.—2 Wms. on Ex'rs 1188. Whenever, therefore, the appellees obtain satisfaction of the judgment obtained in this case, they will have ratified the acts of the administratrix, and will be barred from recovering from any person anything on account of the two hundred and thirty dollars received by Jane Prater as administratrix of her first husband, upon the principle, that satisfaction of a debt, even by a stranger, is an extinguishment of the debt. And the representative of said first husband will be barred to the same extent, because the administratrix, by her acts in relation to that money, has caused that satisfaction to be made to the appellees, which she as administratrix was legally authorized (if not bound) to make.

The judgment below is affirmed.

MOORE *vs.* McGUIRE.

1. A probate judge has no jurisdiction, except when sitting as a court in term time, to take a confession of judgment from the defendant in a bastardy proceeding; such a judgment, therefore, is *coram non judice*, and void.
2. But, *it seems*, the court may declare such judgment void, and proceed with the cause from the last previous continuance.
3. The practice in appeals under the Code, where one defendant wishes to revise a judgment rendered against himself jointly with others, should conform to the former practice under writs of error: the appeal must be sued out in the name of all the defendants, after which there may be a summons and severance as to those who refuse to join; and after a severance, the party refusing to join will not be liable for the costs of the appeal, nor for the statutory damages on affirmance.

APPEAL from the Court of Probate of Tuskaloosa.

W. MOODY, for the appellant.

J. L. MARTIN and E. W. PECK, *contra*.

CHILTON, C. J.—This was a proceeding in bastardy against William D. Moore, as the reputed father of a child born of Elizabeth C. Carroll. The defendant, Moore, was bound over to appear at the Court of Probate for Tuskaloosa county by a justice of the peace, and after the Probate Court took jurisdiction, the cause was continued, at his instance, for several terms. The last continuance, which was ordered on the 8th day of September, 1851, was to a regular term of the Probate Court to be holden on the second Monday in October then next; but it appears that in the meantime, to-wit, on the 24th day of September, 1851, Moore appeared, and confessed judgment for five hundred dollars. Thereupon the court ordered and adjudged, "that he be condemned to pay the sum of fifty dollars a year, for ten years, towards the maintenance and education of ———, the bastard child of which the said Elizabeth Carroll was delivered, and that said defendant pay the cost," &c., "and that execution issue for said costs, and for said several installments as they become due, against the said William D. Moore, and also James B. Moore and Drewry Prewitt, his securities." Then follows a bond, bearing even date with the judgment, executed by the said William D.

and James B. Moore, and Drewry Prewitt, reciting that the said William had been condemned to pay fifty dollars per year for ten years for the support and education of said bastard, and with the condition, that if such payments should be yearly made to the judge of probate, or the lawfully appointed guardian of said child, to be thereafter appointed, the bond was to be void. It appears that Prewitt and James B. Moore were the sureties on the bond taken by the justice of the peace for the appearance of William D. before the Probate Court. Upon this judgment execution issued against all the parties, and the same was superseded by the execution of an appeal bond, and suing out an appeal to this court on the part of James B. Moore, neither of the other parties joining in the appeal.

The several acts referring to proceedings of this character, are cited in the case of Seale v. McClanahan, judge, &c., 21 Ala. 345, and need not be here repeated. It is very clear that the Probate Court can exercise no jurisdiction, except such as is conferred by the statute in such case, and must proceed according to the mode pointed out. By the act of 1850, (see Acts, p. 27,) the judges of these courts are required to hold regular terms thereof, to commence on the second Monday in each month, and may have special or adjourned terms, when required for any special business, at any time. The proceeding before us does not appear to have been had at any special or adjourned term. The record furnishes no evidence that any such term was ordered or held. The cause was, however, taken up on the 24th of September, 1851, after it had been adjourned over on the eighth of that month to the term required by law to be held, to-wit, on the second Monday in October, 1851. We are left to infer, therefore, that the defendant came before the judge of probate on the 24th of September, and confessed the judgment, and that the entry was then made by him, as is shown by the record, there being no term of the court then being held. If this be so, the whole proceeding, after the continuance to the second Monday in October, 1851, is *coram non judice*, and consequently void. The judge, as such, has no jurisdiction to take the confession. He must be sitting *as a court*, and holding either a special or adjourned term, which must be certified upon the record, or

a regular term, of which, being regulated by public law, this court would judicially take notice.

The citation and the bond in this case show that this appeal is not sued out by the party against whom the judgment was rendered, nor is he in any way made a party in this court; but it is prosecuted by one of the sureties to the bond, against whom execution was ordered to issue, and he alone gives the bond to prosecute *his* appeal. There is no bond to supersede, or security for cost, as respects the other defendants; and as to them, under our decisions, there is no appeal.—Code, § 3041.

In causes where there are several defendants against whom a joint judgment is rendered, or a joint duty imposed by the decree of the court, they cannot sue out separate appeals, and thus destroy the unity of the judgment or decree and try the cause piece-meal in this court. The practice, before the adoption of the Code, was, for one to sue out a writ of error in the name of all, even against their consent; and if they refused to join in the assignment of error, for this court, upon motion of the plaintiff in error, to award a summons to the others, that they may join, and on their failure, to allow a severance, and thus enable the plaintiff to prosecute separately.—Jameson v. Coleburn, 1 Stew. & Por. 253. In such case, the bond given by one, with security as required by the statute, operated a *supersedeas* of the judgment.—Webster v. Yancey, Ala. Rep., by Minor, 183. As, under the Code, an appeal is substituted for the writ of error, and is a matter of right upon the execution of a good bond, or giving security for the cost, we think, by analogy to the old rule, it is competent, where there are several persons composing the party plaintiff or defendant, for one to sue out the appeal in the name of all, after which there may be a summons and severance as under the old practice.—Savage & Darrington v. Walsh & Emanuel, 24 Ala. 293. In such case, the certificate of the clerk should show that the appeal was taken by the party actually applying in the name of all, and the bond should be for the prosecution of the appeal generally, and not, as in this case, for the prosecution of a separate appeal by one. Section 3041 of the Code requires security for costs in all cases of appeal where a *supersedeas* bond has not been executed. One appellant may give this for all the rest—so, also,

he may execute a *supersedeas* bond, which will have the same effect. If, however, there be a severance, the party refusing to join would not be liable for the costs in this court, nor for any damages which might be superadded on affirmance.

We have deemed it proper to say what we have as to the merits of this controversy, in order that, should the facts not justify an amendment of the record showing that the Probate Court had jurisdiction to render the judgment upon the confession of William D. Moore, the court may proceed to declare its former action void, and proceed with the cause as it stood anterior to the confession. We are of opinion that this may be done under the former decisions of this court.—Moore v. Easley, admr, &c., 18 Ala. 619, and cases there cited.

Let the appeal be dismissed, with costs.

JONES *vs.* COVEY.

1. The statute which requires the plaintiff, in a suit for freedom, if out of the possession of the person claiming him as a slave, to enter into a recognizance, with sufficient sureties, to make good to his owner all such costs and damages as he shall have incurred in consequence of said suit, and to be forthcoming to abide the sentence of the court, (Clay's Digest, p. 542, § 19,) does not impose on the sheriff the duty of detaining him for that purpose; nor can his sureties, by surrendering their principal to the sheriff, discharge themselves from their bond.
2. But if the sheriff receives him, when surrendered by his sureties, and commits him to jail, he (and *a fortiori* the jailor, who is but his deputy) cannot recover against the sureties for board furnished their principal.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. GEO. D. SHORTRIDGE.

THIS action was commenced before a justice of the peace, by Ransom Covey against Shandy Jones, to recover $36 50, the amount of an open account for boarding one Stephen Walker at defendant's request. The justice having rendered judgment against the plaintiff, the latter removed the cause, by *certiorari*, to the Circuit Court, and there filed his statement

in the usual form. The defendant filed a special plea in answer to the complaint, in which he averred, that said Stephen Walker and others had previously instituted a suit against one Richard Field, under the statute, to recover their freedom; that pending the suit, the court made an order (which is set out at length in the plea) requiring the plaintiffs therein to enter into the statutory recognizance; that pursuant to this order, defendant and others became bail for said Walker; that afterwards defendant, for himself and his co-sureties, surrendered said Walker to the sheriff, in discharge of their said bond, and the sheriff received him, and committed him to jail; that plaintiff's claim now sued on is for keeping said Walker in jail after said surrender, but before the trial of his said suit for freedom; and that on the trial of the said petition, the plaintiffs therein recovered a judgment declaring them to be free. The plaintiff demurred to this plea, and his demurrer was sustained; and this ruling of the court is now assigned for error.

E. W. Peck, for the appellant.

J. L. Martin, *contra.*

GOLDTHWAITE, J.—The statute (Clay's Dig. 542, § 19) provides, that in suits for freedom, the plaintiff, if out of the possession of the party who claims to hold him as a slave, shall enter into a recognizance, with sufficient security, to be approved by the judge, to make good to his owner all such costs and damages as he may incur in consequence of the application of the slave for the recovery of his freedom, and that he will be forthcoming to abide the sentence of the court; and whatever may be the effect of this act, so far as conferring power on the sureties of the applicant to keep him for the purpose of answering the judgment of the court is concerned, it is clear, that the statute imposes no duty on the sheriff to detain him for that purpose. In case of bail, it is true, this duty devolves on him, in the event of the surrender of the principal; but there the right of surrender by the bail, and the obligation of the sheriff to keep, both grow out of the original arrest, which in the first place commits him to the custody of the sheriff, and then, by the force of the bail-bond,

substitutes the bail in the place of the sheriff as the keepers of the principal. There being no obligation on the sheriff to keep, under the act referred to, there is no right in the sureties to deliver to him for that purpose; and they cannot, by a surrender of their principal, discharge themselves from their bond. It is true, that if the sureties were entitled to the custody of their principal, and were to substitute any other person in their place as actual keepers, the law would raise an assumpsit against them, in his favor, for the trouble and expense of such keeping. But this is not the case made by the record. The plea avers the institution of the suit by Walker to recover his freedom, the execution of the bond, his surrender by the appellant and his other co-sureties to the sheriff, and that on such delivery he was committed to jail; and it further avers, that the claim of the appellee is for keeping Walker in jail after his surrender. Upon the facts as thus alleged, the sheriff would have no right of action against the appellant, for the plea shows, with reasonable certainty, that the keeping in jail of Walker was not at his instance or request. It was because the sheriff considered it as a duty, which the law imposed on him, if Walker was delivered to him by his sureties; and his mistake of the law in this respect should not prejudice other parties. If the sheriff could not recover of the appellant on this state of facts, *a fortiori*, the jailor, whom the law regards merely as the deputy or servant of the sheriff, could not.

It follows that the demurrer to the plea should have been overruled.

Judgment reversed, and cause remanded.

KIRBY'S ADM'R *vs.* ANDERS, GUARDIAN &C.

1. When an execution from the probate court against an executor or administrator has been returned "no property found", an execution may issue against him and his sureties, (Code, § 1922,) but the court is not authorized to render a judgment against the sureties on such return; and if one of the sureties die before the return of "no property" against his principal, the summary statutory remedy entirely fails as to him, and cannot be revived by *scire facias*.

APPEAL from the Court of Probate of Tuskaloosa.

SCIRE FACIAS to revive a judgment. The *scire facias* recited, that a decree was rendered on the 18th November, 1852, by the Probate Court of Tuskaloosa, against John Hudson and Nancy Hudson, as administrator and administratrix of the estate of James Hudson, deceased, in favor of Ezekiel Anders, as guardian of Julia Ann B. Hudson, for $1,500, as said Julia's distributive share of said estate; that a *fieri facias* was issued on this decree, against said administrators, on the 2d December, 1852, and was on that day placed in the hands of the sheriff of said county, and "was returned by the said sheriff to a term of the Probate Court aforesaid, on the second Monday in March, 1853, 'no property found'"; that Humphrey B. Rogers and John Kirby were sureties of said Nancy Hudson, on a bond given by her as administratrix of the estate of said James Hudson, deceased, before her intermarriage with said John Hudson; that after the execution of said bond, said John Kirby had died, and James C. Spencer had been appointed by said court "administrator with the will annexed of the estate of said John Kirby." This *scire facias* was issued on the 16th March, 1853, and within less than ten days after the said return of no property found on said execution; and it calls on said Spencer, as administrator of said John Kirby, to show cause "why an execution should not issue against the estate of said John Kirby, on the decree aforesaid," &c.

After the service of this *scire facias*, and on the second Monday in June, 1853, the said Spencer, administrator as aforesaid, appeared, and filed a special plea in answer thereto, which it is unnecessary here to notice. The court sustained a demurrer to this plea, and entered judgment "that said plaintiff recover of said defendant, J. C. Spencer, administrator of the estate of said John Kirby, deceased, the said sum of $1,500, besides costs", &c; "but it appearing to the satisfaction of the court that said estate has been reported insolvent, it is ordered that no execution issue thereon," &c.

The rendition of this judgment is now assigned for error.

MOODY, and ORMOND & NICOLSON, for the appellant.

E. W. PECK, *contra*.

RICE, J.—Section 1922 of the Code authorizes an execution to be issued against an executor or administrator and his sureties, whenever an execution for money has issued from the Probate Court against such executor or administrator, and has been returned to any regular term of such court "no property", by the sheriff of the county. But no power is conferred on that court, by this section or by any other part of our law, to render a judgment against the sureties of an executor or administrator on such return of "no property." Clarke v. West, 5 Ala. 117.

It is only by virtue of the statute, that an execution is allowed to issue against the sureties on such return of "no property". The statute gives this summary remedy only against the sureties; and the courts cannot extend it to the administrator of a surety.—Jenkins v. Gray, 16 Ala. 100.

If a surety dies before such return of no property, the summary remedy allowed by the statute fails as to him. Thompson v. Bondurant, 15 Ala. 346. And our opinion is, that the fair legal conclusion from the recitals in the *scire facias* in this case is, that the surety John Kirby died before the return of "no property" was made. For the *scire facias* issued in less than ten days after said return was made, and shows that Spencer was, on the day it was issued, the administrator with the will annexed of said Kirby; and under our Code, such an administrator could not have been lawfully appointed in less than ten days after the death of the testator.—Code, §§ 1632, 1633, 1657, 1663, 1664, 1665, 1675.

But if the administration bond had the force and effect of a judgment against Kirby at the time of his death, it is certain that no execution issued thereon against him before his death; and therefore, if every other objection to this proceeding by *scire facias* were waived, it must fail, under the rule announced in section 1930 of the Code, which, in effect, is, that where a judgment has been rendered against the decedent before his death, and no *fieri facias* has issued thereon during his life, no execution thereon can issue against the personal representatives, nor can the judgment be revived against them except by suit on the judgment.

In every point of view, the *scire facias* and judgment thereon rendered in the court below are unauthorized by law. That

judgment is reversed, but the cause is not to be remanded: the judgment of reversal is to be so entered here, that the *scire facias* be quashed, and the appellant recover of the appellee the costs of this court and of the court below.

McGAR *vs.* WILLIAMS.

1. One who contracts with a workman for services within his art or calling, has a right to rely upon his representations as to his skill; and although the law will not seek to compel a man to perform that which is impossible, yet it will not allow the workman, after he has obtained money as the price of stipulated services which he cannot perform, by false and fraudulent representations as to his skill in his business, to defeat a recovery for the deceit and consequent injury by setting up the impracticability of those services.
2. Therefore, in an action for deceit against a tinner, who followed the business of putting tin roofs on houses, for that he falsely and fraudulently represented that he would put a tin roof on plaintiff's house which would not leak for twenty years, whereas the said roof did leak before the expiration of two years,—the true question to be submitted to the jury is, not the practicability of putting on a tin roof which would last twenty years without leaking, but whether the representations (if made) were false, and whether plaintiff was thereby deceived to his injury.
3. If defendant's representations related to putting a roof on a building to be erected upon an agreed plan, and plaintiff, afterwards, without defendant's consent, caused a material change to be made in the building, thereby rendering it necessary to make a material change in the form of the roof, he must be considered as having abandoned the original contract, and cannot hold defendant bound by his representations as to the original plan; but if defendant's representations as to the character of the roof had no reference to any particular plan, and he proceeded to put the roof on the building under his contract, without making any objection to the alteration of the plan, the change would not affect his liability.
4. A partial payment made by plaintiff after discovering that the roof leaked, without objecting to it on that ground, is a circumstance to be weighed by the jury in determining whether any fraud was practiced by the defendant, but it cannot operate as an estoppel *in pais*, nor as a release or waiver of an existing cause of action.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN GILL SHORTER.

TRESPASS ON THE CASE by John McGar against R. & R. Williams, for that (as alleged in the first count) the said defendants, who were partners and tinners by trade, and carried on the business of putting tin roofs on houses, being desirous to procure plaintiff to employ them to cover a certain building which he was then erecting in the city of Montgomery, with a tin roof, at a stipulated price, wrongfully contriving and intending to deceive and injure plaintiff, falsely, fraudulently, and deceitfully represented and warranted to him, that they would cover his said building with a tin roof which would not leak for twenty years, and thereby induced him to agree to furnish and pay for the tin, and to pay them a stipulated price per foot for putting it on; and plaintiff avers, that he accordingly did furnish the tin for said roof, and paid the defendants their stipulated price for putting it on, but that their said representations were false and fraudulent, and that said roof did leak within less than two years from the time it was put on, and continues to leak; all which was well known to defendants when they made their said false and fraudulent representations; by means whereof, &c., defendants falsely and fraudulently deceived plaintiff, and he has sustained damage, &c.

The second count alleged, that the plaintiff, at the special instance and request of the defendants, who were tinners by trade, &c., employed them to put a tin roof on a certain building which he was then erecting, and promised to pay them a stipulated sum for the same; that he was induced thus to employ them by their false and fraudulent representations that they would cover said building with a tin roof which would not leak for twenty years; that he furnished the materials for said roof according to his contract, and defendants used them in putting on said roof; and that their said representations, as they well knew when they made them, were in fact false and fraudulent, and said roof did leak within less than two years after it was put on said building; whereby plaintiff has sustained great damage, &c.

The defendants demurred to the whole declaration, and to each count separately, but their demurrers were overruled; and they then pleaded "the general issue, with leave to give any matter of special defence in bar in evidence."

The substance of the evidence adduced on the trial, as set out in the bill of exceptions, may be thus stated: One Seth Robinson, who was plaintiff's agent in contracting for the building of the house, testified, "that a conversation was had at his store in Montgomery between plaintiff and defendant Ralph Williams relative to the covering of the roof of said house; that he could not recollect the precise language used by either of the parties, but his recollection of the substance of what was said by each was about as follows: Said Ralph Williams made application to plaintiff to get the contract for covering said house with tin; plaintiff said in reply, that he did not like tin roofs,—that they were leaky, or apt to leak; Williams then said, he could put a tin roof on said building which he would guaranty would not leak for twenty years, or which he would guaranty would last twenty years without leaking any,—that there was a new mode for putting on a tin roof, which would prevent it from leaking; plaintiff answered, that twenty years was as long as he expected to live himself, and he would give Williams the job; and plaintiff further said, in the presence and hearing of said Williams, to witness, as his agent, 'I turn Mr. Williams over to you; you can let him put on the tin roof.'" The testimony of said Robinson further tended to show, that there was in his possession, at the time of said conversation, a drawing of the plan of said building and of the roof, but it was not proved that this had ever been shown to the defendants, or either of them; that this plan was changed by plaintiff, after said contract with defendants, but before any work had been done on the roof; that defendants, so far as witness knew, did not make any objection to this change in the plan, but witness was absent from the city when they commenced covering the roof; and the proof further tended to show, that this change in the plan of the roof made it more difficult to put on a roof that would not leak; but on this point there was a conflict in the evidence.

The proof further tended to show, that said Robinson and Capt. Wright, who was his commercial partner, discovered that said roof leaked badly the first rain that fell after its completion; that they afterwards made the last payment on the contract to the defendants, but said nothing to them at the time about the leaking of the roof; that Robinson some

time afterwards notified defendants that the roof leaked, and required them to repair it, but they refused to do so; that the leaking caused considerable damage to the building, and that several hundred dollars had been expended by plaintiff in repairing the roof. "The proof further showed, or tended to show, that at the time said roof was put on, and at the time the said agreement was made to put it on, it was impossible to put a tin roof on such a building, which would not leak any for twenty years, or which would last twenty years without leaking any; and this proof was made by tinners, who had been for many years engaged in that business, and who had covered many buildings with tin."

"This being, in substance, all the evidence, the court charged:

1. "That if the jury believed from the evidence that defendants represented or warranted that they would put on plaintiff's said building a tin roof which would not leak any for twenty years, or which would last for twenty years without leaking any, and that it was impossible, with any human skill or ability, at the time of such representation or warranty, to put such a roof on said building, then they must find for the defendants, and the plaintiff could not recover; and to this charge the plaintiff excepted."

2. "But further, that if they believed it possible, by the expenditure of any amount of skill, money, or labor, to make or put on said building a tin roof which would not leak any for twenty years, or which would last for twenty years without leaking any, then the defendants would be bound to make or put on such roof, if the evidence in the cause showed that they had represented or warranted so to do; and to this charge, also, the plaintiff excepted."

3. "In this connection, plaintiff requested the following charge: That if the jury believe from the evidence, that Williams, from his occupation and business, knew that a tin roof could not be made to last twenty years without leaking, and the plaintiff did not know it; and yet Williams agreed with plaintiff to make the roof of tin, to last for twenty years without leaking, and warranted that it should not leak for twenty years, then such agreement and warranty are not void, as being impossible. This charge was given as requested by the plaintiff."

4. "In the same connection, the defendants then asked the court to give the following charge: That if the jury believe from the evidence, that Williams either represented or warranted that the roof he should build for plaintiff would last for twenty years, without leaking any during that period; and if they further believe from the evidence, that it was impossible, at the time said representation or warranty was made, to cover with tin a roof, of the character of that covered by defendants for plaintiff, that would not leak any for twenty years; and that plaintiff knew, or with reasonable diligence might have known, this impossibility, then they must find for the defendants. This charge was given to the jury, at defendants' request, and plaintiff excepted."

5. "The court further charged the jury, that if they believed that the representations of Ralph Williams, as testified to by Robinson, were made to plaintiff as to the original plan of the roof, and that after said representations were made there was a material change made in the plan of the roof, without defendants' consent, then they must find for the defendants, and plaintiff could not recover; and to this charge, also, the plaintiff excepted."

6. "Further, that if defendants' representations were made to plaintiff, as testified to by Robinson, and if the roof which was afterwards put on by them did leak, and thereby damage was done to said building before this suit was commenced; still, if, after the discovery of such leaking, and a full knowledge of all the facts connected therewith, any payment was made to defendants for their work in putting on said roof, as testified to in the foregoing evidence, without objection to the leaking of said roof, or any complaint as to the damage done thereby, then plaintiff could not recover on the first count in his declaration, but such payment, of itself, would not bar a recovery on the second count of his declaration. To this charge, also, plaintiff excepted."

The charges of the court are now assigned for error.

BELSER & BARRETT, for the appellant:

Each count of the declaration is good as a count in case for a false warranty, and also as a count in case for a deceit.—Munroe v. Pritchett, 16 Ala. 785; Myers v. Gilbert, 18 *ib.* 467;

Barney v. Dewey, 13 Johns. 224; Oldham v. Bentley, 6 B. Monroe 431.

The representation and warranty of defendants did not relate to any particular plan of the building, but only to putting on the building, without regard to shape or plan, a tin roof which would not leak for twenty years. Both parties so understood it, and both parties acted accordingly. Such is shown to be the fact, in this respect, both by the declaration and proof.

There is a class of cases where no contract can be made, because the consideration is impossible,—"as if the consideration be a promise that A. shall go from Westminster to Rome in three hours."—Chitty on Con. 58; Story on Con. § 141; Parsons on Con. 382. "But there is a distinction between a contract to do a thing which is impossible in itself, and one whereby the party engages to do something which is absolutely impossible; for in the former case, the contract subsists, notwithstanding it is beyond the power of the party to perform it."—Chitty on Con. 630. And if it be "impossible in fact, but not impossible in its *nature*", the defendants are liable.—Story on Con., § 141. If the doctrine of "impossible considerations" has any application to this case, it cannot avail the defendants, because this is a case of a contract to do a thing which is "impossible in fact, but not impossible in its nature", and good against defendants.—Chitty on Con. 630, and cases there cited in note 2; Parsons on Con. 383-4; Story on Con. (first ed.) § 141; *ib.* (second ed.) § 463.

But the doctrine of "impossible considerations" has no application to any such case as the present, for the following (among other) reasons:

1. That doctrine, whenever it applies, is based upon a reason. "The reason is obvious: from such a consideration no possible benefit or advantage could be derived to the one party, and no detriment to the other; and if that which is offered or provided as a consideration cannot happen, the mere words alone are a nullity."—Parsons on Con. 382-3; 2 Story's Eq. Juris., § 1307. This reason does not exist in or apply to this case, and "*ratione cessante, lex cessat.*". In this case, there is something more than "the mere words alone"; there is an actual benefit and advantage to the defendants—

the price of the work actually received by them on the completion of the work; there is an actual detriment to the plaintiff—the money paid out by him for the tin he furnished them to put on the roof, and the extensive injury done to his large building by the leaking through the roof.

"It is undoubtedly possible, that one may make a promise which it is utterly impossible to perform, and nevertheless the promisee may derive a positive advantage from the mere fact that the promise is made. In such a case, supposing the transaction free from all taint of fraud, this advantage would be a good consideration, but not the promise by itself."—Parsons on Con. 383; 2 Story's Eq. Juris., § 1307.

It is not pretended that there was any fraud on the part of the plaintiff, and if there was fraud on the part of the defendants, it does not lie in their mouth to avail themselves of their own fraud.

2. The doctrine of impossible considerations applies when the thing is "impossible in its nature"—*in rerum natura*,—but not where it is only "impossible in fact."—Story on Con., §141. Suppose defendants had put five or ten or fifty layers of tin on the roof; it is certain that they could have prevented it from leaking by putting on enough layers. It is clearly not "impossible in its nature"—*in rerum natura*.—Story on Con., § 141. (Story on Contracts, cited here, is the first edition; the same may be found in the second edition, section 463.)

We defy the production of any authority for applying the doctrine of "impossible consideration," as contended for by defendants, to any such case as this.—Story's Eq. Jur., § 1307; Wardell v. Fosdick, 13 Johns. 325.

3. The doctrine of *estoppel in pais* applies to the defendants with full force. By their representations and warranty, they induced plaintiff to abandon his formed purpose of covering the building with a slate roof, and to lay out his money in buying tin for a tin roof; they worked up that tin, and made a roof out of it, which leaks badly, and has badly injured the building of plaintiff. The tin, of course, is now worthless, or nearly so. The defendants, after putting on this roof, received the stipulated price for putting it on; and now, with that money in their pockets, and after thus deceiving plaintiff, breaking their warranty and injuring plaintiff, they cannot

be permitted to say that they promised to do what was impossible: they are estopped from setting up any such defence. 1 Greenl. Ev. 240, § 207; McCravy v. Remson, 19 Ala. R.; Dezell v. Odell, 3 Hill's (N. Y.) R. 215, and cases there cited; Stone v. Britton, 22 Ala. 548; Wardell v. Fosdick, *supra*.

4. The only proof as to impossibility of consideration, set forth in the bill of exceptions, was proof which tended to show "that, at the time said roof was put on as aforesaid, it was impossible to put a tin roof on *such a building*, which would not leak *any* for twenty years, or which would last for twenty years without leaking *any*." The first charge of the court is, "that if they believed from the evidence that the defendants represented or warranted that they would put on said building of plaintiff a tin roof which would not leak any for twenty years, or which would last for twenty years without leaking any, and that it was impossible with any human skill or ability, at the time of such representation or warranty, to put such a roof on said building, that then they must find for the defendants, and plaintiff could not recover." Under the pleadings and proof, this charge is contrary to all law and all justice. There was no evidence to authorize the charge on this subject—that is, to turn the plaintiff out of court, merely because "it was impossible", &c., "at the time of such representation or warranty, to put such a roof on said building." Suppose it became possible (as it might, in this age of progress), in a week afterwards: this court will reverse whenever a charge authorizes a jury to draw an inference opposed to all the evidence.—Carey v. Hughes, 17 Ala. Rep.

The second charge does not cure the error in the first charge, nor vary its effect; for it only informs the jury, that if it was possible for the defendants to put such a roof on such a building, "that then the defendants would be bound to make or put on such a roof." This second charge does not instruct the jury, that if they believed the hypothesis embodied in it, the plaintiff could recover in this action, but only that the defendants "would be bound to make or put on such roof." The second charge itself is against the law and the evidence. When and how were the defendants "bound to make or put on such roof"?

Nor does the the third charge (which was given at the re-

quest of plaintiff, after the other charges had been given) cure the error of either the first or second charge. The plaintiff does not contend that he can revise the giving of this third charge: he knows he cannot, because he requested it. But he asked this charge, after the other charges had been given, as "the best he could get" from the presiding judge, and because he wanted to get the presiding judge to go as far *towards* the law as he could be persuaded to go.

The fourth charge is the most palpable violation of law. In effect, it declares, that although the defendant warranted or represented "that the roof he should build for the plaintiff would last for twenty years without leaking during that period", yet if they believed "that, at the time said representation or warranty was made, it was impossible to cover a roof with tin, of the character of that covered by defendants for plaintiff, that would not leak for twenty years, and that plaintiff knew, or with reasonable diligence might have known, this impossibility, then they must find for defendants." This charge is wrong in all points, but most glaringly so in holding, that if "with reasonable diligence plaintiff might have known" (although he did not know) "this impossibility", this of itself would bar all his rights and prevent a recovery in this action.—Rutherford v. McIvor, 21 Ala. 750 (3d head-note). This charge also denies, in effect, the right of the plaintiff to trust to the representations, and even to the warranty, of men of skill in matters of their own trade: "*quisquis est credendus, sua arte.*" It was no fault in plaintiff to rely on and trust to the representation and to the warranty of defendants, without making full inquiry. The defendants were men of skill, and might be trusted.—Young v. Harris, 2 Ala. 108; Camp v. Camp, *ib.* 632; Monell v. Colden, 13 Johns. 395. But as there was fraud and a warranty, plaintiff's knowledge of the matter could not defeat his rights; for a warranty extends to all defects, known or unknown. By warranting, the defendants became *quasi* insurers.—Monell v. Colden, 13 Johns. 395. This court will notice, that not one of the charges allows the plaintiff to recover, even if he was ignorant. Even the third charge does not go that far; and it is clear the jury have not found that plaintiff did know of any impossibility. On the contrary, the evidence shows that defendants assured him

that such a roof could and would be put on for him; and as defendants were skilled in their trade, plaintiff had the right to rely on their representation and warranty.—Oldham v. Bentley, 6 B. Mon. 431.

The fifth charge is also clearly erroneous. The declaration and evidence both show, that the representations and warranty of defendants were not made "as to the original plan of the roof", nor as to any particular plan of the roof; but these declarations and warranty of defendants were that they could and would put *on said building* a tin roof which would not leak for twenty years. A material change "in the plan of the roof" could not exempt them from all liability, when it is clear that they proceeded (without any objection as to any change in the plan of the roof) to put on a tin roof, which leaked badly and injured the house, and received their pay for the same according to the agreed price—the very price fixed for putting on the roof. The charge is against law, and not warranted by the evidence.—Carey v. Hughes, 17 Ala. R.

The sixth charge is also erroneous. Even if the plaintiff himself, or his authorized agent, had paid defendants the agreed price for their work, "after the discovery of such leaking, and a full knowledge of all the facts connected therewith", such payment could not have operated, *per se*, as a bar to this suit or to a recovery on either count. Such payment is neither a waiver of the fraud or warranty.—Huckabee v. Albritton, 10 Ala. 657. Such payment is neither a release, nor receipt of something in satisfaction for the wrong done,—one of which is essential to destroy a right of action.—Leavitt v. Smith, 7 Ala. 182, and cases cited on that page. But the payment was not made by plaintiff or his agent, but by Wright, who never was the agent of plaintiff, as the proof shows. As soon as the roof leaked and injured the house, a right of action vested in plaintiff, which has never been released nor satisfied. The leak continues since the alleged payment, and the damages are continuing. How can such payment to defendants, of the agreed price of their work, destroy plaintiff's vested right to recover not only for the damages done before such payment, but the damages done since such payment? "Whenever an injury is, in its nature, continued, there can be no question that the party injured is entitled to recover for all damages

sustained previous to the trial."—Pepoon v. Clark, 1 Mills' Const. Rep. (S. C.) 65-137; Puckett v. Smith, 5 Strob. Law Rep. 26.

The argument of defendant's counsel, that all the charges ought to be grouped together and reconciled, is unsound. If that were done, parties might (and would often) be deprived of their legal rights, because this court can never tell under what particular charge the jury found their verdict. For instance, in this case, several of the charges tell the jury that if they believe a few specified facts, they must find for defendants. How can this court say that the jury did not find their verdict under only one of those charges? And how can this court tell under which one of those charges the jury did find? The rule is clear, that however correct one charge may be, yet if another charge is given which is incorrect, this court will reverse. That is the true doctrine.—Holmes v. The State, 23 Ala. 17. The argument that the jury have found that plaintiff knew it was impossible for defendants to make such a roof as they represented and warranted they would make, is not sustained by the record. No charge turned upon that matter singly; and if it had, this court could not say that the jury found under that charge, for they may have found under one of the other charges. Each charge must be judged by itself, in connection with the evidence. Thus judging the several charges, not one of them lays down the law correctly: they severally deny the plaintiff the rights which the law secures to him.

The case of Gilmer v. Ware, 16 Ala. 252, has no application to this case: the facts of that case place it in a different class from this.

No court of justice can, on deliberation, sustain the defences relied on here; for "wherever there is a deceit, coupled with an injury, an action on the case will lie."—Morgan v. Patrick, 7 Ala. 187; Oldham v. Bentley, 6 B. Mon. 431. It matters not in what the deceit may consist—whether in a false representation by men of skill, respecting a matter in their own trade, that they would do a possible or impossible thing, or in a false warranty that they would do a possible thing or an impossible thing. Men of skill have no legal right to deceive and acquire money by their deceit, and then with that money

in their hands to say to the injured party, "You ought to have known, or might have known, that we could not do what we said we would do for you; that we were telling you a falsehood, in order to get your money."

WATTS, JUDGE & JACKSON, *contra*:

1. The declaration was demurred to in the court below, on the ground that case and assumpsit are joined in different counts. The demurrer, we think, was erroneously overruled. If, however, case and assumpsit are not joined in the declaration, one of the counts is a count in case for a deceit, and the other a count in case for a false warranty. But take the declaration as it is stated to be by appellant, and still no principle can be deduced therefrom which will avail him, or affect the case in its present aspect. Whether a warranty was made or not, it is clear that a contract was entered into between the parties. A contract, or undertaking, is set forth in each count of the declaration. The *gravamen* of the complaint, in each count, is, that defendants did not comply with or perform the contract, as set forth, in consequence of which (it is alleged) injury and damage have resulted. Under the averments of the declaration, then, plaintiff below was not entitled to recover, unless there was a valid contract between the parties. We contend that the contract was impossible of performance, and therefore void. "*Lex neminem cogit ad vana aut impossibilia.*"—Story on Cont., p. 379, § 462; Chitty on Cont., mar. p. 58; *ib.*, mar. p. 630; Parsons on Cont., 382-3-4.

Contracts void because founded upon impossible considerations, are divided into two classes—1st, those void because founded upon a consideration impossible in fact; and, 2d, those void because founded upon a consideration impossible in law. For instances of each class, see Story on Cont., p. 379, § 462. The contract in this case comes within the first class; and it is, consequently, a question of fact to be decided by a jury, whether it be possible or impossible of performance. No court could judicially know whether or not a tin roof could be built that would not leak any for twenty years; or whether or not a man could "go from Westminster to Rome in three hours." In this case, the question of possibility or impossibility of performance was submitted to that tribunal

which alone could decide it—the jury. Their decision upon it is final, and it cannot be disturbed by this court, whether properly or improperly decided, if there was evidence upon which it might have been decided; and the court below did not err in laying down the law upon the question.

Did the court err in either of the charges to the jury on this question? Take the charges given, separately and singly, or collectively, and there is no error in either. The point of defence being that the contract was void because it was founded upon a consideration impossible in fact, and evidence that such was the fact (viz., that it was impossible to do the act undertaken to be done) having been introduced before the jury, the court below could not have done otherwise than to charge the law as it is laid down in the first charge given. But to prevent misapprehension, or the jury from being misled by the said first charge, the court below, for the benefit of the plaintiff, gave the second charge. The second charge was in explanation of the first, and favorable to the plaintiff, although he excepted to it. The third charge, given in the same connection, was given at the request of plaintiff; and we contend that said third charge was erroneous, as against the defendants. It is not contended, that under the supposed state of facts, Williams would not be responsible. He would be liable in an action on the case, but not for not performing his contract, as is this action; the action should be for "falsely and fraudulently representing that he could cover the roof with tin so that it would not leak any for twenty years, when he knew that it was impossible in fact so to do; and that plaintiff, not knowing to the contrary, relied and acted upon the representation to his injury." Such an averment would have authorized such a charge as the third charge to be given. The fourth charge is intimately connected with the third, and whether properly or improperly given, is immaterial; for, the declaration being upon a contract, if that contract is void for an impossible consideration, it matters not whether McGar and Williams, either one or both, knew, or did not know, that the consideration was possible or impossible; or whether either one or both might, or might not, with due diligence, have known it; for no count in the declaration was framed with a view to hold Williams liable for a fraud, in any other aspect

than for not performing his contract. Hence, if there should be error in the fourth charge, it is error without injury. If an action be brought upon a contract, no matter whether it be case or assumpsit, if the contract is void for an impossible consideration, knowledge or want of knowledge (in either one or both of the parties) that the contract is void for this reason, is wholly immaterial.

2. But it is contended by counsel for the appellant, that the doctrine of "impossible considerations" has no application to this case. This doctrine has application to every contract founded upon a consideration impossible in fact, as well as impossible in law.—See Story, Chitty, and Parsons, on Contracts, *supra*. In the language of Lord Kenyon, in Nerot v. Wallace, 3 Term Rep. 17, "The ground on which I found my judgment is this: that every person who, in consideration of some advantage either to himself or to another, promises a benefit, must have the power of conferring that benefit, up to the extent to which that benefit professes to go, and that not only in fact, but in law."—3 Term Rep. 17.

There is a distinction between contracts impossible in their nature, and impossible in fact, on account of contingencies not provided for. For the distinction, and cases illustrative of the distinction, see Story on Cont., pp. 380-81, § 463. The contract in this case is of the former nature; for the jury found upon the evidence, under the charge of the court, "that no possible skill, labor, or expenditure," could accomplish it.

It is also said that the doctrine of "impossible considerations" does not apply to this case, "because it is founded upon a reason that does not exist in or apply to this case"; for, it is said, it applies only to cases where "no possible benefit can be derived to the one party, and no detriment to the other." This is not, cannot be so, and the authorities cited do not sustain the position. Parsons on Contracts, cited to sustain it, says: "One may make a promise which it is utterly impossible to perform, and nevertheless the promisee may derive a positive advantage from it. In such a case the advantage would be a good consideration, but not the promise by itself." Parsons on Cont. 383.

3. We have been considering the case upon the supposition that the contract is the *gravamen* of the action in both counts

of the declaration. But inasmuch as it is contended that both counts are good, as upon a contract with a warranty, as well also as for a deceit in making fraudulent representations, irrespective of any contract, we will now notice the case in this double aspect. Take the case in either aspect, and (all the evidence being set out in the bill of exceptions) this court must perceive and hold that McGar was not entitled to recover. In the contract and warranty aspect of the case, he was not entitled to a verdict, because the contract and warranty was to do an impossible thing. In the other aspect of the case (there being no contract or warranty), he was not entitled to recover, because, by the payment of the money for the work done, with a full knowledge of all the facts constituting the fraud, if any, he elected to waive the fraud, and could not afterwards set it up.—Gilmer v. Ware, 19 Ala. 252. The foregoing propositions being correct, in neither aspect of the case was McGar entitled to recover; and if there was error, it was error without injury.

4. The doctrine of *estoppel in pais*, which is invoked for the aid of McGar, has no application to the case, except in so far as it applies to estop McGar from suing for a fraud which he has waived. If it applies, as contended for by counsel on the other side, it follows, that if one contracts to perform a physical impossibility, and represents that he can do it, although the contract be void and impossible, yet it must be performed! There must be mutuality in an estoppel, for "one who is not bound by, cannot take advantage of it": "it must be reciprocal to every intent."—Lansing v. Montgomery, 2 Johns. 382; Bolling v. Mayor, 3 Rand. 563. And estoppels are not favored.—4 Mass. 180; *ib.* 273; 9 Pick. 520. And they must be certain to every intent, and precise and clear.—3 Miss. 529. Further: "where it appears, in that which would otherwise work the estoppel, that the act or deed is void, the party is not estopped from showing the truth."—Sinclair v. Johnson, 8 Cow. 543.

5. It is said that appellees deceived McGar,—by the deceit acquired money, which they have in their pockets,—and that with this money in hand, they say to McGar, "You ought to have known we could not do what we promised to do." If we have McGar's money, the law presumes he got the worth

of it, or he would not have voluntarily paid it, with a full knowledge of all the facts. That we have a right to defend when sued upon the contract, we have already shown; and that the fraud, if any, has been waived by McGar, has also been shown.

There is no error in the fifth charge; but if there is, it is error without injury; for all the evidence is set out in the bill of exceptions, and from it it clearly appears he is not entitled to recover, irrespective of the matter charged upon in said fifth charge.

6. The sixth charge is fully sustained by Gilmer v. Ware, 19 Ala. 252.

CHILTON, C. J.—In Oldham v. Bentley, 6 B. Mon. 428-31, the rule of law is stated, with much accuracy, to be, that a false and fraudulent representation, made by one party to a contract, whereby he makes gain to himself and occasions loss to the other party, gives to the defrauded party a cause of action for the deceit; *provided*, the representation relate to a matter deemed material, and as to which the deceived party has a right to require a promise from the other, or to look to him for a true representation.

Let us apply this rule to the case before us. The defendants followed the business of putting on tin roofs, and it was material, as furnishing a strong inducement for the plaintiff to employ them, to be informed as to the extent of their skill, and the length of time which a roof put on by them would last without leaking. The plaintiff had a right to rely upon their representations as to these matters, for they are supposed to be peculiarly within their knowledge, pertaining to their art or calling; and if they made false representations, whereby the plaintiff was induced to employ them, and have thus knowingly deceived and defrauded the plaintiff by causing him to believe that they could put on a tin roof which would last twenty years without leaking, we know of no principle of law which would allow them to hold on to the gains from such a transaction, and avoid all liability, upon the ground that the representation which constituted the inducement for the plaintiff to part with his money was not only false, but incapable of being made good. If the plaintiff was

deceived by the false and fraudulent representations made by the defendants, to his injury and their gain, it would be to allow them to take advantage of their own wrong, to permit them to set up the impracticability of making good their representation as a reason for retaining such gain. "The law", it is said, "will not sanction dishonest views and practices, by enabling an individual to acquire through the medium of his deception any right or interest."—Broom's Maxims 320.

While it is certainly true, that the law will not seek to compel a man to perform that which is either vain or fruitless, or which he cannot possibly perform, at the same time it will not permit him, by false and fraudulent practices or assertions, to obtain money as the price of a proffered good which he cannot confer. The fraud and consequent injury constitute the wrong for which the law gives the remedy; and in this form of action, regard can be had to the nature of the representation, or thing promised to be done, only so far as is necessary to determine whether these essential requisites exist, and the *quantum* of the damages sustained.

If a man contract with another that he will build a tower which shall reach to the moon, this would be vain, foolish, and impossible in the nature of things. It would create no obligation, for the maxim, "*Lex non cogit impossibilia*", would apply. No one having sufficient capacity to contract at all, could be deceived in a matter so obviously ridiculous and impracticable; and consequently, no action of deceit would lie for any such false assurance or representation. But it is very different in a case like the one before us, where persons holding themselves out to the world as skilled in a particular branch of mechanics induce others to incur expense and part with their money, upon false and fraudulent assurances that their skill will enable them to accomplish results which, although hitherto deemed unattainable, are not manifestly absurd and essentially impracticable in the nature of things. Concede that workmen are generally agreed that a tin roof cannot be made which will last twenty years without leaking, still it is not palpably impossible, if it be so at all. There is nothing in the nature of things, which renders it absurd or ridiculous to believe that human skill and ingenuity has attained, or may attain, to such a result; hence there is no reason why the

defendants could not have committed a fraud, or made a false warranty, respecting it. They are, as we have said, workmen, supposed to be skilled in this branch of business; and however improbable the result which they proposed to attain, the plaintiff might well have reposed upon the presumption that they knew the completion of the duty they had undertaken was within the compass of their power.—Broom's Legal Maxims, p. 121, and notes. We come, therefore, to the conclusion, that the court erred in submitting to the jury, as a turning point in the cause, the question as to the practicability of making good their assurance, or representation, on the part of defendants, that the roof should last twenty years without leaking. The true question was, whether the representation, if made, was false, and whether the plaintiff was deceived thereby to his injury. That they promised more than their skill would enable them to perform, neither lessens the fraud nor in any way mitigates the injury.

We think the court very correctly laid down the law in the fifth charge. If the defendants' representations, or warranty, related to putting a roof upon the building to be erected after a given plan, and the plaintiff caused a material change to be made in the building without the consent of the defendants, thereby rendering it necessary to make a material change in the form of the roof, the plaintiff must be considered as having abandoned the original contract, and could not be allowed to hold the defendants bound by any agreement or representations made with respect to the original plan. If, on the other hand, the agreement and representation as to the character of the roof had no reference to any particular plan or form of the roof, and the defendants proceeded, under their contract, without any objection to the alteration of the plan, to put the roof on the building, then the change, although it might have rendered it more difficult to cover securely, would not affect the defendants' liability.

The court below, we are of opinion, committed an error in giving the sixth charge, as to the effect of the payment. It was not an absolute bar to a recovery, on either count, but was a circumstance to be weighed by the jury, as tending to show that no fraud was committed. It was for them to decide, whether the plaintiff, or his authorized agent, with a full

knowledge of the defects, would have completed the payment without objecting to the work, if the defendants had falsely and fraudulently promised, or represented, that the roof which they would put on would last twenty years without leaking any.

This case is distinguishable from Gilmer v. Ware, 19 Ala. 252, cited by defendants' counsel. Here, the fraud (if any) and injury were consummated before the payment; and to hold the payment to be a bar, would give it the effect of releasing a right of action which had already accrued. In that case, however, the contract, so far as the purchaser was concerned, was inchoate; and being fully advised of the fraudulent circumstances, before he completed the contract by complying with his bid, the purchaser could not have been deceived, but elected to take the property as it was by paying for it; thus, as it were, incorporating the alleged fraudulent circumstances into the contract. The payment in this case, if made with a full knowledge of the defects or leaks in the roof, is, at most, but evidence to be weighed by the jury, tending to show that no false or fraudulent representation was made to the plaintiff's injury. It cannot operate as an *estoppel in pais*, nor as a release or waiver of an existing cause of action.—Huckabee v. Albritton, 10 Ala. 657.

Let the judgment be reversed, and the cause remanded.

RICE, J., having been of counsel, did not sit in this case.

McTYER *vs.* STEELE ET AL.

1. The general rule is, that to make the principal personally liable on a written contract made by his agent, it must be executed in the name of the principal, and appear to be his own contract; but there are many exceptions to this rule, one of which is, that a bill of lading, signed by the master of a vessel in his own, in the usual course of employment, will bind the owner.
2. A bill of lading may partake of the character of both a receipt and a contract, and in the latter quality cannot be varied or contradicted by parol evidence; but this principle does not apply to parol testimony which shows that it is the contract of other persons than him in whose name it is executed.

APPEAL from the Circuit Court of Perry.
Tried before the Hon. THOS. A. WALKER.

TRESPASS ON THE CASE by William McTyer against William Hendrix, William S. Hanna, and John C. Steele, as common carriers, to recover damages for defendants' breach of duty and contract in failing to deliver to the consignees fifteen bales of cotton, which were shipped by plaintiff on board their flat-boat, and were consigned to McDowell, Withers & Co. at Mobile. The defendants severally pleaded not guilty, in short by consent.

On the trial, as the plaintiff's bill of exceptions shows, "the plaintiff offered in evidence a bill of lading, or receipt, which was in the following words and figures, to-wit:

'Received of W. McTyer fifteen bales of cotton, in good order, which I promise to deliver in the port of Mobile, in like condition, to McDowell, Withers & Co., at $1 per bale; marked thus, W. McTyer; 2 bales of the lot marked W. McTyer the bagging and rope excepted, and J. K. April 6, 1852. (Signed) 'J. C. Steele'.

"Plaintiff then offered evidence, tending to show that he had placed on a flat-boat fifteen bales of cotton at the time and place mentioned in the bill of lading and declaration; that the boat had been run on a log or snag in the Cahaba river, so as to submerge and ruin the cotton, and cause a total loss to the owner. He also offered testimony, tending to show that the said boat was purchased by John C. Steele, but at the time of the purchase he directed the builder to call on Hendrix and Hanna, the other defendants, for his pay; also, that before the delivery of the boat Hendrix called upon the builder, and said to him, that he wanted the boat upon which plaintiff's cotton was shipped, and also another boat, as soon the river should rise; and it was proved, also, that said Hanna did afterwards pay for said boat. Plaintiff then offered to prove as a circumstance in the case, that said John C. Steele, at the time of giving said receipt, or bill of lading, was and had been notoriously insolvent; but to the introduction of this proof of Steele's insolvency, the other defendants (who alone appeared and defended the suit) objected, and the court excluded the same; and to this plaintiff excepted.

"Plaintiff proposed to prove, by parol, in order to connect said Hendrix and Hanna with said Steele and bill of lading, and show them liable to plaintiff, that said Steele was the chief officer on said boat, to-wit, pilot or captain thereof; and then proposed to prove, by one O. Belcher, that he (Belcher) had been for many years a captain, or pilot, on a flat running said Cahaba river, and that it was a part of the captain or pilot's duty to give receipts and bills of lading for freight, such as was given in this case for freight received on said boat; and that said boat was, and was known to be, the property of said Hendrix and Hanna. To this evidence said Hendrix and Hanna objected, on the ground that no liability could be fixed on them by such parol evidence, after plaintiff had introduced and shown said bill of lading for the cotton sued for. The court sustained the objection, so far as said Hendrix and Hanna were concerned, but allowed it to go to the jury as against Steele; and to this ruling of the court plaintiff excepted.

"Plaintiff then proposed to prove, by parol, that said Hendrix and Hanna had, as partners, been engaged for several years as common carriers in the transportation of cotton on said river; that notwithstanding said Steele had, in some instances, given a receipt, or bill of lading, to others for cotton shipped on the same boat, yet said Hendrix and Hanna, in other instances, had given receipts and bills of lading in their own names to others, for cotton shipped on the same boat. This evidence, on the objection of said Hendrix and Hanna, the court ruled inadmissible, and to this plaintiff excepted.

"Plaintiff further offered to prove, by parol, with a view, in connection with other facts, to show the liability of said Hendrix and Hanna as common carriers, and in order to connect said Hendrix and Hanna with said Steele in his liability to plaintiff,—that acts of ownership were exercised over said boat by said Hendrix and Hanna, both before and after the same was wrecked, in the presence of plaintiff and others; that they received freight for the same, and gave bills of lading therefor in their own names. This evidence, also, on the objection of said Hendrix and Hanna, was held inadmissible, and plaintiff excepted.

"The court then charged the jury, that the bill of lading sued on in this case, was of a two-fold character—first, a receipt; and, secondly, a contract to carry and deliver cotton in Mobile; that, as a receipt, it may be explained or contradicted by proof; but, as a contract for carrying and delivering cotton, &c., it cannot be contradicted by parol proof; and therefore the parol evidence offered by plaintiff, to connect said Hendrix and Hanna with said bill of lading, and thus to fix a liability on them, was inadmissible as to them, and therefore excluded, but admissible and good as to Steele. To this charge, also, plaintiff excepted."

In consequence of these rulings of the court, the plaintiff was forced to take a nonsuit; which he now moves to set aside, and assigns all the rulings of the court against him for error.

JOSEPH R. JOHN, for the appellant:

1. The insolvency of Steele was proper evidence for several purposes: 1st, to show the relationship of the parties; 2d, to show that the contract, although signed by him alone, must have been signed as master, or as agent for himself and his co-partners; 3d, to rebut the presumption that credit was given to him alone.

2. The owners of a vessel, employed in the transportation of merchandise and produce, are responsible on a bill of lading signed as this was, when it is shown that the person signing it is master of the vessel; and this may be shown by such proof as was proposed in this case.—Story on Contracts, p. 287, §§ 368, 370, 371; Story on Bailments, p. 326, §§ 506, 507; May v. Babcock, 4 Ohio 334; Deford v. Seinour, 1 Smith's R. 325, cited in 10 U. S. Digest, p. 208, § 313.

3. The testimony excluded tended to show a joint ownership in the boat; and as the owners would be liable under such a contract as here shown, the testimony ought not to have been excluded. The question was not whether it was sufficient, but whether it was legal. If the defendants were partners in the boat, or in the transportation of cotton on the boat, as alleged, then they would be liable on a contract in regard to the business of the partnership, though made by one partner in his own name.—Story on Partnership, §§ 103

to 107; Collyer on Partnership, § 386; Owings & Co. v. Trotter & Scott, 1 Bibb's R. 157.

4. The court was clearly in error, in supposing that this evidence tended to vary or contradict the bill of lading. It had no such effect.—Story on Agency, (4th ed.) § 270, n. 3.

5. If the cotton had been delivered in Mobile, the defendants could have recovered from plaintiff the price for the freight, by showing that Steele was their agent, and received the cotton for them, although he signed the receipt for it in his own name.—Edwards v. Golding, 20 Vermont R. 30. If so, plaintiff can enforce the contract against them, by making the same proof, as the contract must be mutual.

WM. M. MURPHY and I. W. GARROTT, *contra*:

1. The rule is inflexible, that if a written instrument is perfect and complete in itself, parol evidence cannot be received to add another term to it, or change its legal effect. West & West v. Kelly's Executors, 19 Ala. 353; Walker v. Clay & Clay, 21 *ib.* 797. It is conceded, that receipts for the payment of money, or in discharge of a contract, may be explained by parol proof; but there is a broad distinction between receipts of that nature, and the bill of lading in this case, which was the foundation of the action. So far from being the discharge of a contract, the writing was the commencement of the liability. This distinction was taken in Smith v. Brown, 3 Hawks' R. 581, a case very similar to this; and it was there expressly decided, that parol evidence is not admissible to vary or contradict the writing. To the same effect are the following authorities: 1 Greenl. Ev. § 305; Barrett v. Rogers, 7 Mass. 297; Benjamin v. Sinclair, 1 Bail. 174; May v. Babcock, 4 Ohio R. 334. The plaintiff proceeded upon the contract as valid and subsisting; while it is only by repudiating it as fraudulent that he is permitted to vary or contradict it by parol proof.—Dixon v. Barclay, 22 Ala. 380.

2. The insolvency of Steele had nothing to do with the liability of the other defendants.—Donley v. Camp, 22 Ala. 666.

3. The evidence of Belcher, as to the length of time he had been on the river, was entirely irrelevant. The object in

offering it probably was, to prove a custom; but the proof does not pretend to show a custom, and, even if it did, it could have nothing to do with the construction of a contract.

4. The fact that Hendrix and Hanna had given receipts, in their own names, for cotton shipped on the same boat, can throw no light on the bill of lading in this case. Each case must stand or fall by itself. Hendrix and Hanna might well be the owners of the boat, and still in no way liable.—Sims & Scott v. Jones, 6 Port. 138. Steele, Hendrix, and Hanna might each bind himself separately as a common carrier, although all were on the same boat.—McClure v. Richardson, 1 Rice's R. 215; 1 Sup. U. S. Digest, p. 245, § 107.

5. Even if Steele was a partner with the other defendants, he had the right to bind himself individually; and the bill of lading clearly shows, on its face, that he intended to bind himself only.

GOLDTHWAITE, J.—The general rule is, that to make the principal personally liable, on a written contract made by his agent, it should be executed in his own name, and appear to be his own contract.—Story on Agency, § 161. But there are many exceptions to this rule. Thus it is well settled, that a captain of a ship has an incidental authority to make all contracts belonging to the ordinary employment of the vessel, and if he enters into such contracts in his own name, although he may be personally liable, his principal is also responsible. Pickering v. Holt, 6 Greenl. 160; Abbott on Shipp. part 2, ch. 3, § 1, ed. 1829; Story on Agency, § 161, 162, and cases there cited. So, a bill of lading, signed by the master in his own name, in the usual course of the employment of the ship, will bind the owner.—Story on Agency, § 161. It is true, that such a writing may partake of the character both of a receipt and contract, and that, in its latter quality, it is not to be contradicted by parol; but evidence to fix a liability on others than the party who signed it, is not varying the contract in the sense meant by Mr. Greenleaf in his work on Evidence, § 305. Testimony could not be received to show that the article shipped was to be delivered at a different port, or to other consignees than those specified in the bill of lading. As to these and like matters, it is properly regarded

as a contract, and governed by the same rules; but the principle does not shut out testimony, which shows that it is the contract of other persons than him in whose name it is executed.

It follows from what we have said, that if the bills of lading were executed by the captain, or chief officer of the boat, and in the usual course of its business, the contract, although made in his name, was equally the contract of the owners. Any facts, therefore, which conduced to show the ownership of Hendrix and Hanna, were proper, in connection with other facts, as making out one link in the chain against them, and the evidence to that effect was improperly rejected by the court.

From what we have said it follows, also, that the charge of the court, to the effect that Hendrix and Hanna could not be connected with the bill of lading by parol proof, was also erroneous.

The judgment of nonsuit must be set aside, and the cause remanded.

HARKNESS *vs.* SEARS & WALKER.

1. In the United States, public policy requires, (and the adjudicated cases have decided,) that the same protection which the common law in England afforded to fixtures erected for the purposes of trade, should be extended to erections for agricultural purposes.
2. As between vendor and vendee, the stationary machinery by which turning-lathes or other portable machines which are of equal value everywhere are impelled, if erected on the land by the vendor during his ownership, for his own use, for the purposes of either trade or agriculture, and fixed in or to the ground, or to some substance which has already become a part of the freehold, are irremovable fixtures, which pass to the vendee under the deed for the land.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. GEO. D. SHORTRIDGE.

THIS action was commenced by Sears & Walker against Robert Harkness, before a justice of the peace, in March, 1854,

to recover "damages in a sum not exceeding fifty dollars for trespass." The defendant took an appeal from the justice's judgment to the Circuit Court, where another trial was had, which resulted in another judgment against him under the rulings of the court.

The bill of exceptions shows these facts: "On the trial, there was evidence offered by the defendant, conducing to show that one McCullough was the owner of ten acres of land in the vicinity of the town of Clinton, on which he resided and carried on his trade as a cabinet workman; that for the purpose of assisting him in his trade and work, about five years since, he erected on said lot a turning-lathe, which was propelled by horse power, and a large cog-wheel, let into the ground, on a block of wood, upon a pivot, and a band-wheel connected with said turning-lathe and cabinet shop, all like the running gear of a gin, and used by said McCullough alone for the purpose of his trade; that in July, 1853, said McCullough sold said lot of land to plaintiffs, and conveyed the same to them by deed, without specifying any part of said machinery, lathe, and cog-wheel. There was evidence, also, conducing to show that said McCullough remained on said land until December, 1853, and, as he was about to remove from the State, he sold said turning-lathe, cog-wheel, and band-wheel to one P. Freeman, for fifteen dollars; and that the defendant, as the agent of said McCullough, delivered and hauled said turning-lathe, cog-wheel, and band-wheel to said Freeman, a few days after said sale.

"The court charged the jury, that if they believed from the evidence that said cog-wheel was attached to the said lot of land, in the ordinary way, on a pivot resting on a block of wood in the ground, in the same manner in which the running gear of a gin is attached, then the said cog-wheel was a fixture, and passed to the plaintiffs by said deed; to which charge the defendant excepted, and asked the court to charge the jury, that under the state of facts in evidence, as above recited, the said cog-wheel was not a fixture, and did not pass with the freehold under said deed; which charge the court refused, and the defendant excepted."

The charge given, and the refusal to charge as requested, are now assigned for error.

Wm. P. Webb, for the appellant:

A fixture is defined by Chitty to be, "a personal chattel annexed to the freehold."—Chitty on Contracts, p. 314. 1. It must be fixed or fastened in or to the ground,—actually annexed.—Walker v. Sherman, 20 Wend. 636. 2. It must be adapted or appropriated to the use or enjoyment of the realty to which it is annexed.—*Ib.*; Teaff v. Hewitt, 1 Ohio St. R. 530; Amos & F. on Fixtures, p. 11. 3. The intention of the party making the annexation may be inferred, 1st, from the nature of the article; 2d, from the structure and mode of annexation: and, 3d, from the use or purpose for which it is made.—Teaff v. Hewitt, *supra.*

Applying these criteria to the case at bar, it will appear that the cog-wheel was not a fixture, and did not pass with the land. 1. It was slightly attached or set on a pivot, and could be removed without injury to the freehold. 2. It was not adapted to the use or enjoyment of the freehold, as the running gear of a gin on a cotton plantation, as in the case of McDaniel v. Moody, 3 Stew. 314. 3. It was erected and used by McCullough for the purpose of his trade, as shown by the structure and mode of application.

Machinery let into caps, or blocks of timber, have been held removable.—Chitty on Contracts, p. 321; Davis v. Jones, 3 B. & A. 165; Lawton v. Lawton, 3 Atk. 14; 5 Den. R. 337.

The taking away of the cog-wheel, even if it were a fixture, could only be sued for by action of trespass *quare clausum fregit*, and not by suit before a justice.—Sturgis v. Warren, 11 Vermont R. 433.

S. F. Hale, *contra:*

It is to be observed, that the question here arises between vendor and vendee, and not between landlord and tenant; and therefore the rule in the latter class of cases has no application, and the cases are not authority.

For the appellees it is insisted, that the cog-wheel has all the requisites necessary to constitute a fixture—that is, 1st, it was annexed to the realty; 2d, it was stationary in its character, and appropriated to the use and purposes of the work-shop, and that part of the realty with which it was connected; and, 3d, the person who placed the wheel on the

land was, at the time, the owner of the fee, and it must therefore be intended that the annexation was made as a permanent accession to the freehold, and so intended by McCullough when he made it.—See Teaff. v. Hewitt, 1 Ohio St. R. 522-40, and cases there cited.

Upon a careful examination of all the authorities, these two propositions will be found true: 1st. That the relaxation of the rule in relation to fixtures, in favor of trade, applies only as between landlord and tenant, and not as between vendor and vendee, nor between heir and executor. 2d. The motive power of machinery, which is stationary in its nature, as between vendor and vendee, is always regarded as a fixture, and passes with the freehold; whilst the machinery propelled is sometimes regarded as a fixture, and sometimes as a personal chattel, dependent upon the manner in which it is annexed or attached to the realty.—McDaniel v. Moody, 3 Stew. 314; Hancock v. Jordan, 7 Ala. 450; Miller v. Plumb, 6 Cowen's R. 666; Sparks v. The State Bank, 7 Blackf. 471; Colegrave v. Dias Santos, 2 Barn. & Cress. 76; 9 Serg. & Low. 30; Goddard v. Chase, 7 Mass. 433; Noble v. Bosworth, 19 Pick. 314; Walker v. Sherman, 20 Wend. 636; Elwes v. Maw, 3 East's R. 37; Powell and Wife v. Monson & Brimfield Man. Co., 3 Mason's R. 459; Union Bank v. Emerson, 15 Mass. 159; Vorhis v. Freeman, 2 Watts & Serg. 116; Pyle v. Pennock, *ib.* 391; Winslow v. Merchants' Ins. Co., 4 Metc. 306; Despatch Line of Packets v. Bellamy Man. Co., 12 N. H. 154; Farrar v. Stackpole, 6 Greenl. 154.

RICE, J.—The exceptions to the action of the court below present the question, whether the vendor, after the sale and conveyance of his land, can lawfully remove fixtures erected on it by himself, for his own use, during his ownership and before the sale and conveyance; it appearing that the fixtures were erected for the purpose of assisting him in his trade, and used by him alone for that purpose.

The general rule of the common law subjected everything affixed to the freehold to the law governing the freehold. This rule never was universal, nor inflexible, nor without exceptions. It was applied most rigorously between executor and heir, in favor of the latter; with more liberality be-

tween tenant for life, or in tail, and remainder-man, or reversioner, in favor of the former; and with still greater generosity between landlord and tenant. An exception in favor of fixtures erected for the purposes of trade, seems to have been almost as ancient as the rule itself.—Elwes v. Maw, 3 East's R. 38.

The common law of England, however, (as has been well remarked by the Supreme Court of the United States,) is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles, and claimed it as their birth-right; but they brought with them, and adopted, only that portion which was applicable to their condition. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The interest of the owner of the soil, as well as public policy, in America, required that erections for agricultural purposes, put upon the land by a tenant, should receive the same protection in favor of the tenant, that was extended by the common law of England to fixtures made for the purposes of trade. But it is certain, that the general doctrine of the common law of England, as to things annexed to the freehold, so far as it respects *heirs and executors*, was adopted by our ancestors, and became part of the common law of America. And the same rule as to fixtures, that applies between heir and executor, applies equally as between vendor and vendee. Van Ness v. Packard, 2 Peters 137; 2 Kent's Com. 343 to 347; English v. Foote, 8 Sm. & Mar. 444; Miller v. Plumb, 6 Cowen 666; Despatch Line v. Bellamy Man. Co., 12 N. H. 232; 20 Johns. 30; 1 Harr. & Johns. 291; 10 Barb. Sup. C. Rep. 496; see, also, the numerous cases cited by the counsel of appellee.

It is settled by the adjudicated cases, as part of the common law of America, that as between vendor and vendee, *the stationary machinery* by which turning-lathes, or any of those machines which are portable and of equal use everywhere, are impelled, must be regarded as *irremovable* fixtures and part of the freehold, whenever such stationary machinery shall have been erected on the land by the vendor himself during his ownership, for his own use, and fixed in or to the ground, or to some substance already become a part of the

freehold,—whether erected for the purposes of trade or agriculture; and that such stationary machinery passes by the deed of the vendor to the vendee, conveying the land on which it stands.—Preston v. Briggs, 16 Verm. 124; Union Bank v. Emerson, 15 Mass. 159; Day v. Perkins, 2 Sandf. Ch. R. 364; Walker v. Sherman, 20 Wend. 636; Winslow v. Mer. Ins. Co. 4 Metc. 306; Hancock v. Jordan, 7 Ala. 448; Amos & Ferard on Fixtures 11.

It will be noticed, that the appellant, in removing the cog-wheel from the land, acted as agent of the vendor (McCullough.) This then is, in effect, a case between vendor and vendee. Thus regarding it, the court below committed no error, and its judgment is affirmed.

THE MAYOR, ALDERMEN, &c., OF MOBILE
vs.
ROWLAND & CO.

1. Section 1 of the Code, which declares that the word "*person*", when used therein, "includes a *corporation* as well as a *natural person*", does not so control the subsequent sections (2516, *et seq.*) giving the process of garnishment against "*any person* indebted to the defendant in attachment," &c., as to authorize a garnishment against a public municipal corporation, to whom those sections, as shown by their provisions, are inapplicable.
2. Process of garnishment does not lie against a public municipal corporation, to subject the salary of one of its police officers.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. McKINSTRY.

THIS case was submitted to the decision of the court below, as appears from the bill of exceptions, on the following agreed statement of facts:

"The plaintiffs (B. F. Rowland & Co.) regularly obtained their judgment, before a magistrate, against the defendant (H. C. Benje), for $21 26, besides costs. The money not being made under execution on said judgment, a garnishment

process was issued, in due form, and in strict accordance with the law, which garnishment was regularly served upon the city of Mobile. Said city, by its mayor, duly appeared, and objected to make answer in the case, on the ground that said city could not be garnisheed, under any circumstances, in such a case; and, also, upon the further ground, that said Benje was one of the police guard of said city, and that his wages could not be thus attached, for reasons of public policy, in such a case. These objections on the part of the city were overruled by the magistrate, and said garnishee was ordered to answer. Said city then made answer, by its mayor, and under its proper seal, "that said Benje is one of the members of the police guard of said city, and is paid $66 66 for his services monthly, payable at the end of each month; that at the end of the present month, said city will be indebted to said Benje, on account of his said wages, in the sum of $66 66." This answer was made in July, 1853, and the magistrate rendered judgment thereon against said garnishees, which judgment was in due form, and for the correct amount due on said original judgment. From this judgment said garnishees appealed to said City Court, and now insist upon their exemption from said garnishment process. Whereupon the court determined, that said city was subject to the process of garnishment, and that the facts disclosed by the answer would not protect the salary of said Benje from the attachment; to which determination of the court said city excepted."

The rendition of judgment against the appellants, on the facts disclosed by the record, is now assigned for error.

JNO. T. TAYLOR, for the appellants:

1. Can a corporation aggregate be garnisheed under our laws? Section 2516 of the Code provides, that an attachment may be executed by summoning "any person indebted, or having in his possession, or under his control, property belonging to the defendant." Section 2517 provides, that "such person" shall appear, and answer on oath, according to the terms of the citation, and may, if required by the plaintiff, be compelled to answer orally in the presence of the court. If these acts stood alone, there could be but little doubt on the question; but the first section of the Code says, that the word

person shall include corporations as well as natural persons. This latter statute can have no effect in all that great variety of cases where the word person is used, and where a corporation by reason of its artificial character could not be reached; in other cases, corporations were included without the act.—See Ang. & Ames on Corp. 195-6. Being, therefore, affirmative of the common law only, it must be construed to mean this: "That in all cases where the word person is used in the Code, it shall include corporations, except where such a construction would be inconsistent with the terms of the particular act wherein the word is used. For instance, it could not be included in any of those sections relative to partnerships, because two corporations cannot form a partnership (Angell & Ames, p. 313; 7 Wend. 412); nor to any penal statutes (Angell & Ames, p. 313); nor to section 2175 or 2651 of the Code. Long before the adoption of the Code our court, in two cases (1 Ala. 396, and 4 *ib.* 753), suggested that there was a doubt whether a corporation aggregate could be garnisheed. Both these cases assert, that a corporation can only answer under its seal; yet the act says, the garnishee must answer "under oath", and if he fails to do so, unless the plaintiff waives it, a judgment may go against the garnishee. The acts also say, that the plaintiff may require an oral answer "in open court"; yet a corporation cannot be brought into court, nor can it answer by agent, because the cases last referred to declare that not even the answer of the cashier on oath will in any way bind a bank. Is it not clear, therefore, that the word *persons*, as used in these garnishment acts, do not (and were not intended to) include corporations?

The right of garnishment is a new and strictly statutory remedy, unknown to the common law; and to give it such a construction as would include corporations, would be to add to the act a new provision, which the Legislature intentionally left out; for it is to be presumed they were aware of the decisions above referred to, and the law of corporations as it stood at the time of passing the Code.—1 Paine's C. C. R. 400; 3 Mass. 288. It is true, the plaintiff may waive the answer being under oath, and may waive the person's being present in court; but suppose he rather chose not to waive it, and to take his judgment for default? But besides, the defendant

in execution is to be concluded by the answer (Code, § 2563; 9 Port. 390); he too has the right to demand the oath, and has, perhaps, too much at stake to be satisfied with a mere statement under seal, for which no one's conscience is liable. In 2d Mass. R. 37, the right to garnishee a corporation, (under their trustee process,) under acts similar to ours, was fully and ably argued by counsel; but the court, without hearing counsel for the defendant, unanimously decided, that a corporation aggregate could not be summoned as trustee, and that effects and credits in the hands of a corporation could not be so attached.—Liddersdale v. Montrose, 3 Durn. & E., top p. 441; 3 *ib.* 367 (682); 1 H. Black. 627; 3 Bos. & P. 324; 7 R. 413; Story on Contracts, § 577.

2. But does not public policy protect the wages of a police officer from attachment? Money due from a government or state is thus guarded for the benefit of the public. The law says, the state must be permitted to select its own officers, from any condition or position in society, and cannot be made subject to the power of individual creditors to drive their selections from service when they choose; nor can the creditor be permitted to paralyze the energy or in any way cripple the efficiency of a state's officer by taking from him the means afforded by the state which gives bread and clothing to himself and family.—Searg. on Att. 62, 140; also, 12 Ala. 597. The government of the city is a part of the state government. It is the exercise of a portion of the state sovereignty, and should in like manner be upheld by the same public policy.

3. Is the answer sufficient to authorize the attachment of the defendant's salary? On this point, the attention of the court is called to the difference between the answer of the garnishee as set out in the record, and as it is stated in the bill of exceptions. The statements are very different, but in either view it does not warrant a judgment. On looking at sections 16, 24 and 44 of the charter, it will be seen that any of the officers of the corporation may be removed at any time, and that the compensation ceases on removal. All public officers have, also, the right to resign at their pleasure. The answer, as stated in the bill of exceptions, says, "there was nothing due until the end of the then month. The answer itself, copied in the record, says, "an order had been given by

Benje for the salary of the then month, but there would be the $66 66 for the next succeeding month, provided he did not resign, or was discharged." The court will see, therefore, there was no contract, or absolute indebtedness depending only upon time. But whether there would ever be an indebtedness, depended upon two uncertainties: 1st, whether the mayor would remove him; and, 2d, whether he did not voluntarily resign; the latter of which would very certainly happen, if the pay was garnisheed beforehand. Besides, if the city could be garnisheed for future dues, and a judgment rendered, they would then, even if the debtor was willing to continue, be driven in self-defence to keep in their employ many times worthless and inefficient officers, because they were already bound to pay; or, if an officer found himself about to be discharged for ignorance, inefficiency, or corruption, he could, by obtaining a garnishment to be levied, thus secure his place for the next year, or at least the salary for the year. This would be to subvert both law and justice. Sound policy requires that the corporation should not only have the free right to remove, but also to adjust accounts at any time; to deduct for lost time, breach of duty and losses by wilful omissions or default of duty. In this way, such men as form the city police can be made to feel a proper responsibility to the city, and soberness and energy in their profession insured. Again, the corporate authorities, who vote the pay, have the right to examine and pass upon the accounts to be paid. The public has a right to demand that this privilege be awarded to them. While the mayor can approve or not of ordinances granting compensation, he has not the right to order payments made without the concurrence of the other co-ordinate branches of the city government; and yet, if the mayor can be constantly summoned to answer process of garnishments, and his statements alone of sums are to be entered up as absolute judgments against the city, then as to these particulars, the law and authority of the other branches of the city legislature is by the judgment of the justice of the peace repealed.—3 Mass. 288; 8 *ib.* 247; 7 *ib.* 259-60.

O. S. Jewett, *contra.* (No brief on file.)

CHILTON, C. J.—There is some difficulty in the main point involved in this case, namely, whether a public municipal corporation can be garnisheed for a debt due, or to fall due, to one of its police officers as his salary. This question is for the first time presented to this court. True, the point was alluded to, in respect of corporations aggregate, in The Bank v. Poe, 1 Ala. 396, and The Bank v. Leavens, 4 *ib.* 753; but in neither case was it decided. In the first, however, it was determined, that the answer of the cashier of the Bank to a summons of garnishment, was not sufficient to authorize a judgment against the corporation—that such an answer must be made under the common seal of the Bank, by the express authority of either the directors or the president, who thus far is the executive officer of the board of directors.

We have examined our own statutes upon the subject, as well as the authorities generally, and we have become satisfied that no garnishment will run in the case before us.

The statute, it is true, authorizes any person to be summoned as a garnishee, (Code, § 2516,) and section 1 of the Code declares, that the word "person", when used in it, includes a corporation as well as a natural person; but this must be understood only of such provisions as will allow this signification to be given without violating their evident sense and meaning. When by the context it is clear no such meaning was intended, and when by thus construing the word *person* it would render the Code, which must be taken as a whole, incongruous, we must depart from the letter, to give effect to the spirit and manifest meaning and intent of the Legislature.

The garnishee must be summoned to appear and answer *on oath*.—Code, § 2517. He must file his answer, *on oath*, within the three first days of the term to which the summons is made returnable.—§ 2540. He may be *orally examined* in the presence of the court.—*Ib.* So, if the garnishee fail to appear as provided and answer, judgment may be rendered against him, &c.—§ 2545. These, and similar provisions which might be mentioned, clearly show that the statutes of garnishment cannot be applied to corporations, which, from their impersonal, artificial character, cannot be sworn; and cannot, in the nature of things, personally appear in court.

But there is another ground upon which we may rest our

opinion. This is a public municipal corporation: its officers are public servants, and the public is entitled to their service in the discharge of their duties. If they are to be made parties to controversies between debtor and creditor,—if these officers may be summoned to attend any and all of the courts having cognizance of garnishments throughout the State, and are to appear in person at the bar, awaiting such trials, on pain of having judgment by default go against the corporation, the public interest must necessarily suffer. Aside from this, the city corporation, which is a government for the city, invested with certain attributes of sovereignty delegated to it by its charter, is entitled to fill its offices by a selection of suitable persons from among the whole community. This privilege would exist but in name, if those who depend upon their salaries for a livelihood could be deprived of such salaries by garnishment, and thus cut off from the means of subsistence. The result would be, that only those who were free from debt, or who could subsist without their salaries, could fill such offices, and the public service might suffer for want of persons to accept or hold them.

The principle is the same which obtains in regard to the salaries of the officers of the State, and there are decisions which hold that the salaries of officers of municipal corporations are not within the statutes of garnishment, where those statutes are similar to our own.—Hawthorn v. City of St. Louis, 11 Missouri R. 59; 2 Mass. 37; see, also, Wicks v. Br. Bank of Mobile, 12 Ala. 594-97.

Let the judgment be reversed, and the cause remanded.

CHAMBERLAIN *vs.* GAILLARD.

1. A judgment is final and conclusive between the parties, when rendered on a verdict on the merits, not only as to the facts actually litigated and decided, but also as to all facts necessarily involved in the issue; and if a particular matter, which was not necessarily involved in the issue, but which the issue was broad enough to cover, actually arose and was determined, it may be connected with the record by evidence *aliunde*.

2. In detinue for a slave, a plea in bar to the further maintenance of the suit, setting up a recovery by defendant against plaintiff in a subsequent action of assumpsit for the hire of the slave, is fatally defective on demurrer, unless it shows that the question of ownership entered into the issue on that trial: an averment that the declaration in that suit alleged that the plaintiff therein was the owner of the slave, is not sufficient, as the recovery might have been had under a bailment, which would render the allegation of ownership immaterial.
3. If the plea contains an additional averment, that the ownership of the slave formed a material part of the issue on the former trial, it is still defective: to make it a good plea in bar to the detinue suit, it must show that, on the former trial, the jury necessarily determined that the plaintiff therein was the owner of the slave down to the commencement of the detinue suit.
4. If issue is joined on such defective plea, unless defendant shows a state of facts which negatives his right to have recovered on any other ground than that of his ownership, his plea is not sustained, and the court may so instruct the jury.
5. The practice in this State is settled, that the plaintiff, unless he waives his right to open the case, is entitled to the opening and conclusion in every case, no matter what the form of the issue may be.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

DETINUE by Thomas Gaillard against Charles M. Chamberlain, for a slave named Adam. The defendant pleaded *non detinet*, and two special pleas which were, in substance, as follows:

2. That plaintiff ought not further to have or maintain his action, because defendant, at the February term, 1852, of the City Court of Mobile, impleaded plaintiff in an action of assumpsit for the hire of the slave Adam, in plaintiff's declaration now claimed, and in his declaration alleged that he was the owner of said slave; that the defendant in said action of assumpsit pleaded the general issue, and issue was thereon joined between them; that a trial was had on the issue thus joined at a subsequent day of the term, and said cause was submitted to a jury, who returned a verdict for the plaintiff therein, on which judgment was afterwards rendered by the court in his favor; and that said judgment is still in full force, unreversed, &c.

3. The second special plea is substantially the same as the first, with this additional averment: "And said defendant further says, that his ownership of the said negro was involved

in said issue, and formed a material part thereof; and that under said issue, joined upon said plea, in said trial, the said plaintiff strongly litigated and warmly contested, as he was in law entitled to do, this defendant's right of property in said slave, and mainly insisted upon his (this defendant's) lack thereof as a defence," &c.

To each of these special pleas a demurrer was interposed, which was sustained as to the first, and overruled as to the other.

On the trial of the cause, as the bill of exceptions states, the defendant, by leave of the court, withdrew the plea of *non detinet*, "and then insisted that he held the affirmative of the sole issue presented by the pleadings, viz., the issue joined by consent upon his special plea of a former recovery since the commencement of this suit; and as a consequence of said affirmative relation thereto, and of his being necessarily the actor therein, and hence of right entitled to open and reply in the investigation of the truth or falsity thereof, moved the court to allow him to open and reply on the trial of said issue; which motion the court overruled, and decided that the plaintiff was entitled to open and close the said cause; and to this ruling of the court the defendant excepted."

After the plaintiff had introduced the whole of his testimony, the defendant, in support of his said special plea, offered in evidence, without objection, a duly certified transcript of the record therein mentioned, and then introduced as a witness the Hon. Alex. McKinstry, who presided as judge on the trial of said action of assumpsit, and who testified, "that on said former trial before him, there was proof before the jury as to the ownership of the slave now in controversy,—that the question of such ownership was argued by the counsel before the jury, and that he, as judge, thereupon charged and instructed said jury." This was all the evidence before the jury in reference to said special plea; and the court thereupon instructed the jury, among other things, "that it did not appear from the record of said action of assumpsit of Chamberlain vs. Gaillard that the title of the slave Adam was necessarily decided on the trial of that cause, and that the said record, even when aided by the testimony of Judge McKinstry, was not sufficient to sustain the special plea in this action"; and to this charge the defendant excepted.

The defendant requested the following charges in writing:

"1. That the question of the title to the slave in controversy was within the issue of the former suit; and that this being purely a point of law, the decision of the court in regard to it is conclusive, and the jury cannot inquire into it.

"2. That the question of title being within the issue of the former suit, if the jury believe from the evidence adduced that there was any proof exhibited upon the former trial respecting this question, they must find for the defendant.

"3. That the record of the former judgment shows that the plaintiff in this suit might, consistently with the issue in that record disclosed, have controverted this defendant's right of property to the slave Adam upon the trial of the cause in which said judgment was rendered; and that if they believe from the evidence adduced that the plaintiff did, in fact, controvert this defendant's right to said slave upon said former trial, they must find for the defendant, unless they think from the evidence that he has been divested of his right since the date of said judgment."

The court refused each one of these charges, and to each refusal the defendant excepted; and he now assigns for error, 1st, the sustaining of the demurrer to his first special plea; and, 2d, the several rulings of the court shown by the bill of exceptions.

A. J. Requier, for the appellant:

I. The court sued in sustaining the demurrer to the second plea of defendant, being a special plea suggesting a former judgment against the further maintenance of suit. The judgment pleaded was rendered during the pendency of the present action, viz., on the 7th February, 1852. This suit was commenced on the 6th May, 1851, and tried the 20th May, 1853, for the first time. As to form:—It was well pleaded against the further maintenance of suit.—3 Ala. 200; 13 *ib.* 208; 21 *ib.* 483. But form is not reached by general demurrer.—9 Port. R. 397. As to substance:—If the former record clearly shows that the judgment to which the effect of concluding the party is ascribed, could not have passed without deciding a particular matter, it will be considered as having settled that matter for all future actions.

C. & H. Notes to Phil. Ev., 2 part, note 22, p. 36, p. 9; 9 Port. R. 397; 20 Ala. 798. The facts essential to the plaintiff's right of property in the negro were charged in the former suit, and the plaintiff could not have recovered without proving a right of property in the slave. The plea alleges, that the declaration contained none but general counts, and that the general issue was pleaded to it. In order to prove a consideration for an implied promise, in an action on the common counts, to which the general issue is pleaded, the matters of fact from which the promise is implied must be shown.—2 Greenl. Ev. § 105. The effect of the general issue, when so pleaded, is to deny all the matters of fact from which the promise may be implied.—*Ib.* § 135. The plaintiff, in that suit was, therefore, obliged to show, 1st, that he was the owner of the slave, and, 2d, that he had been retained and kept by the defendant; from which facts only, the law would infer a promise; and the general issue, denying all the matters of fact from which a promise might be implied, necessarily put in issue the first of those essential facts, viz., the plaintiff's right of property. Conceding that the former suit was not well brought, the judgment therein is unreversed and of force, and if it "abounded with errors" it would nevertheless still be binding.—16 Ala. 271.

II. As to the rulings during the trial, and the charges given and refused:—

1. The party holding the affirmative of an issue, is, as a matter of right, entitled to open and close the proof and argument.—1 Greenl. Ev. § 74-5; C. & H. Notes to Phil. Ev., part 1, p. 644; 8 Ala. 746. This is especially so, when the defendant is willing, at the trial, to admit the whole of the plaintiff's case, except in so far as it may be affected by his affirmative plea. Such was the effect of the defendant's withdrawal in the cause of the general plea of *non detinet*.

2. The court erred in charging, that it did not appear from the record of the former suit that the title of the slave, Adam, was therein necessarily decided. The question under the sole plea was not whether it was necessarily decided, but whether it was within the issue merely. The charge was consequently abstract.

3. The court also erred in charging that the record, even

aided by the testimony of Judge McKinstry, was not sufficient to sustain the special plea. The bill of exceptions shows, that neither the introduction of the record in evidence, nor the testimony of Judge McKinstry, in aid of it, was excepted to. This was an admission of their sufficiency as far as they went. 21 Ala. 42. That they *together* cover the whole matter of the plea, is palpably evident.

4. The court erred in refusing to give the several instructions asked for by defendant, as shown by the bill of exceptions. The first of those charges was, "that the question of the title to the slave Adam was within the issue of the former suit," &c. When it it is kept in mind, that he had already charged the jury that the same question of title was not necessarily decided in the former suit, it is manifest that he thus denied the sufficiency of the special plea which had been sustained, after demurrer, by his predecessor, and whose invalidity could not be assumed. As to the sufficiency of that plea, there can be no doubt. The principle is, that when the matter in controversy in the pending suit, is within the issue of the former proceeding, and might or might not have been decided therein, the record may be explained by evidence *aliunde*.—C. & H. Notes to Phil. Ev., 2 part, p. 39; *ib.* note 14, p. 13; 6 Ala. 32; 7 *ib.* 166; 17 *ib.* 733. The other charges refused are abundantly illustrated by the authorities above cited.

A. R. MANNING, *contra*. [No brief on file.]

GOLDTHWAITE, J.—The first question is as to the sufficiency of the second plea. This plea is to the further maintenance of the suit, and avers, in substance, that after the commencement of the present action, Chamberlain sued Gaillard in assumpsit, to recover for the use and hire of the slave sued for in the present action, alleging that he was the owner of said slave; and that in that action a recovery was had by Chamberlain upon the merits. The rule is, that judgments are final and conclusive between the parties, when rendered on a verdict on the merits, not only as to the facts actually litigated and decided, but that they are equally as conclusive upon all the facts which were necessarily involved

in the issue (Cummings v. McGehee, 9 Port. 349; Greenl. Ev., §§ 522, 528; C. & H. Notes to Phil. Ev., 830); and although the particular matter is not necessarily involved in the issue, yet if the issue is broad enough to cover it, and it actually arose and was determined, it may then be connected with the record by evidence *aliunde*.—Robinson v. Windham, 9 Port. 397; Davidson v. Shipman, 6 Ala. 27; Wood v. Jackson, 8 Wend. 9; C. & H. Notes to Phil. Ev. (2 ed.) 847-8. If it were otherwise, a judgment upon the same matter, and between the same parties, could never be conclusive, in any case where, from the generality of the pleadings, the particular facts tried and determined did not appear upon the face of the record itself. In the plea we are considering, however, there is no allegation that the question of ownership entered into the issue of the former action. The averment, in effect, is simply, that the defendant in the action of detinue obtained a judgment, in a suit commenced after that action, for the hire of the same slave, and that the declaration in such suit contained an averment that he was the owner of the slave. But the gist of the action was, the right to recover for the use of the slave; and if that right was established, it would have been entirely immaterial whether the plaintiff in that action was the owner of the slave or not. If Gaillard had hired the slave of him, and thus recognized his title as owner, he would not be allowed to dispute that fact; and in such a case, the allegation of ownership would have been treated as an immaterial averment.—Peters v. Heydenfeldt, 3 Ala. 215. The court, therefore, could not say from an inspection of the record alone, that the ownership of the slave was necessarily involved in the action referred to in the plea; and there was, for that reason, no error in sustaining the demurrer.

In relation to the charge of the court: The special plea on which the trial was had, was, in substance, a former recovery by Chamberlain against Gaillard, in which the record is set out, with the additional allegation, that the ownership of the slave sued for formed a material part of the issue on that trial. The appellant, to support this plea, introduced the proceedings and judgment, corresponding with the record described in it, showing an action of assumpsit by the appellant against the appellee to recover for the use and hire of

a slave, named Adam; the declaration alleging that Chamberlain was his owner. This suit was commenced, and judgment rendered in favor of the plaintiff therein, during the pendency of the action of detinue, to the further maintenance of which it was pleaded in bar; and in connection with the record, the judge who presided on the former trial was introduced as a witness, who proved that, on such trial, there was evidence before the jury as to the ownership of the slave in the trial then proceeding,—that this question of ownership was argued to the jury on the first trial, and that they were charged and instructed by the judge in relation thereto. The charge of the court upon this evidence was, that the record, and testimony offered in connection with it, were not sufficient to sustain the plea. That the plea is defective is certain, for, conceding that the question of title was material in the suit to which it refers, that is not enough. It should show that it was material, so as to bar the suit against which it is pleaded; and that it could not do, unless it showed that it was necessarily determined by the jury that Chamberlain was the owner of the slave at the time of the commencement of the detinue suit. Chamberlain, as we have seen, might have recovered upon the bailment of the slave by him, without reference to the ownership; or he might have proved that he was the owner at a period any time within six years before the commencement of his action, and claimed the right to recover hire during the period his title lasted. It was necessary that the plea should have shown that Chamberlain, in the former suit, rested his right to recover upon the ownership alone, and that the verdict and judgment necessarily determined that he was the owner down to the period we have mentioned.—Lawrence v. Hunt, 10 Wend. 80. The plea is, that on the former trial the question of ownership was material to the right of the plaintiff in that suit to recover; and unless the defendant shows a state of facts which negatives his right to recover on any other ground, his plea is not sustained. That there was evidence on the other trial as to the ownership of the slave; that that question was argued before the jury, and a charge given upon it by the judge, is not enough. These facts all may exist, and the determination of this question not necessarily be involved. *Non*

constat but that Chamberlain may have predicated his right to recover upon a bailment, in which the title would have been immaterial, as well as upon the question of ownership. It was not (and could not be) shown that the question of title was determined by the jury, until it was shown that they could not have found their verdict without determining this question; and unless the facts established such to have been the case, the plea was not sustained. In this aspect, as there was no evidence tending to show that the evidence was confined to the question of ownership alone—the issue being broad enough to allow Chamberlain to claim independently of that fact—the plea was not sustained, and there was no error in the charge to that effect.

As to the counsel for the defendant, on the trial below, being entitled to open and conclude the investigation and argument of the cause, in consequence of having the affirmative of the issue as presented by the plea: We do not regard that question as an open one in this court. Under our practice, the plaintiff is entitled to the opening and conclusion in every case, unless he waives the right to open.—Worsham v. Goar, 4 Port. 441; Grady v. Hammond, 21 Ala. 427.

Judgment affirmed.

LUNDIE *vs.* BRADFORD.

1. A garnishee answered, in writing, that the defendant in attachment, during the year previous to the service of the garnishment, had furnished him with $150 in money, and had given him his note for $51; that in consideration of said money and note, he agreed to enter a tract of land at the land-office for said defendant, and subsequently filed a land-warrant in said office to be located for said defendant; that one of the officers doubted whether the location could be made in the form desired, and this caused a delay in the location; and that after the service of the garnishment he made no further effort to have the location made: *Held*, that the plaintiff in attachment was not entitled to a judgment against the garnishee on this answer.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. JOHN GILL SHORTER.

THE appellant, having obtained a judgment against James A. Fowler, summoned the appellee by process of garnishment as Fowler's debtor; and the garnishee answered in writing as follows: "Some time in the early part of the year 1851, James A. Fowler, by himself, and through Alexander White, Esq., furnished me with one hundred and fifty dollars in money, or thereabouts, and gave me (*his note for ?*) fifty-one dollars. In consideration of said money and note, executed to me on the 24th February, 1851, I agreed to enter in the land-office at Lebanon, Ala., for the said Fowler, one quarter-section of land, and subsequently filed in said land-office a land-warrant calling for one hundred and sixty acres to be located for said Fowler; but one of the officers having doubts whether the warrant could be located in the shape desired by Fowler, the location was delayed for a time, and since I was garnisheed by Lundie I have made no efforts to locate the same. In addition to the fifty-one dollar note on said Fowler, he owes Bradford & Lawler thirty dollars, with interest since January, 1839, and some cost on the same. I know of no other effects of said Fowler, nor do I know of any one who owes him anything." On this answer the court discharged the garnishee, and its judgment is now assigned for error.

WHITE & PARSONS, for the appellant:

On the state of facts disclosed by the answer, the plaintiff was entitled to a judgment against the garnishee. There is no question that Bradford had two hundred dollars in money belonging to Fowler at the time the garnishment was served, and that Fowler could, at any time before he entered the land, have notified him not to enter it; and on such notice being given, he could have sued Bradford for the money, if the latter failed to re-pay it. What Fowler could do of his own volition, the law empowers his creditor to do by service of the garnishment. A proceeding by garnishment is the institution of a suit by the attaching creditor, and is governed by the general rules applicable to other suits. It is a legal remedy, and is to be so treated.—5 Ala. 442; 8 *ib.* 576. There is no ground for saying that this is a mere agreement to enter the land. The answer does not bear such a construction. It shows that Fowler furnished the money with which Bradford

was to enter the land. It does not show a valid and binding contract, by which Bradford acquired a right or title to the money, and Fowler only the benefit of a contract with him. As the land is not yet entered, whose is the money? is it not Fowler's, unless the garnishment holds it?—Mann v. Buford, 3 Ala. 312.

MORGAN & MARTIN, *contra*, contended, that the answer showed that Bradford owed Fowler nothing, and was only bound to the performance of his agreement to enter the land, upon the discharge of which he had already entered when the garnishment was served; and they cited Blair v. Rhodes, 5 Ala. 648; Mims v. Parker & Coffman, 1 *ib.* 422.

RICE, J.—Our first impression was, that the answer of the garnishee might fairly be construed as an admission, that the money he received from Fowler was received and held by him as the money of Fowler, which, if convenient, he would apply, under Fowler's direction, to the payment of the government price for a quarter-section of land at the land-office at Lebanon for Fowler. But, upon careful examination, we find that the answer does not admit that the money has ever been the money of Fowler since the garnishee received it. On the contrary, it shows that the money became the money of the garnishee *eo instanti* when he received it; for it asserts that, in consideration of said money and the note described in the answer, the garnishee agreed to enter in said land-office, for said Fowler, a quarter-section of land, and subsequently, and before the service of garnishment, filed in said land-office a land-warrant calling for one hundred and sixty acres of land to be located for said Fowler. This agreement is valid.—Fitzpatrick v. Hanrick, 11 Ala. 783. But, although the agreement is valid, and by its force the money became the money of the garnishee, yet such an agreement cannot be made available to a judgment creditor of Fowler under the process of garnishment. For the settled rule in this State is, that garnishment only lies to subject those demands for which the judgment debtor could maintain *debt* or *indebitatus assumpsit*.—Cook v. Walthall, 20 Ala. 334.

It is too plain for argument, that Fowler could not main-

tain *debt* or *indebitatus assumpsit* against the garnishee, upon the facts stated in the answer. There was, therefore, no error in the judgment of the court below discharging the garnishee upon the facts shown in his answer, and the said judgment is affirmed.

HUDSON *vs.* CROW.

1. An objection to the competency of a witness, on the ground of interest, must be distinctly made at the first opportunity, and cannot be subsequently raised; and if the party, in accepting service of interrogatories, stipulates that he thereby "waives no objection to their legality, pertinency, relevancy, or competency", this will not enable him afterwards to object to the competency of the witness on account of interest.
2. If the holder of a note, having bound himself by written contract to account for it to the owner, recovers judgment on it in his own name, and by private agreement with the sheriff, after sale under execution, takes the property at the purchaser's bid, he thereby becomes liable to the owner of the note for the amount in money, and cannot raise objections to the sale of which the defendant in execution might avail himself; and if the amount was lessened by expenses, court costs, &c., the *onus* of proving it devolves on him.
3. Nor is he entitled to a deduction for expenses incurred by him in pursuing the defendant in execution, who had secretly left the county, taking his property with him, when such expenses are not shown to have been necessarily incurred, nor to have been such as the bailor would be bound to pay.
4. Evidence of a demand of specie by the sheriff, by the direction of the plaintiff in execution, after the property had been bid off, and of the purchaser's offer to pay in current bank-notes with the difference between them and specie, is admissible as part of the *res gestæ*.
5. A general objection to an entire deposition, when a portion of it contains legal evidence, may be overruled.

APPEAL from the Circuit Court of Benton.

Tried before the Hon. ANDREW B. MOORE.

ASSUMPSIT, on the common money counts, by Daniel Crow against Samuel P. Hudson, "to recover the proceeds of a note which plaintiff placed in defendant's hands for collection, executed by Williamson Williams, for $665 52, and dated on the

15th *March*, 1841." The only plea was the general issue, with leave to give any matter in evidence which might be pleaded in bar.

On the trial, the plaintiff read in evidence a receipt, signed by S. P. Hudson & Co., of which the following is a copy:—

"Received of Daniel Crow one note of hand on Williamson Williams, for $665 52, dated *May* 15, 1841, due one day after date, and payable to Wm. Raiford or bearer; for which we promise to account to the said D. Crow, when he pays us $300 in South Carolina funds, which is to be paid in two or three months, with interest from this date. July 1, 1841."

"The plaintiff introduced evidence, also, tending to show that S. P. Hudson caused suit to be brought upon said note, in the name of the payee, for the use of himself, against said Williams, upon which a judgment was rendered 10th July, 1843; and that an execution, issued on this judgment, was levied on eighteen bales of cotton as the property of the defendant. There was proof, also, tending to show that the sheriff afterwards exposed said cotton to public sale, and sold it in two lots of nine bales each; that said Hudson became the purchaser of one of said lots, at a certain price per pound, and that one Woodruff bid off the other, but failed to take said cotton, or to pay the price therefor. The plaintiff then proved, that the sheriff, at the request of Hudson, after said cotton had been bid off by Woodruff, demanded specie, and that Woodruff, not having the specie, offered to pay for it in South Carolina funds, with the difference between such funds and specie, which the sheriff declined to receive. To the introduction of this proof the defendant objected, but his objection was overruled, and the evidence admitted; and to this the defendant excepted.

"The plaintiff introduced proof, also, tending to show that, on the day after said sale, and after Woodruff surrendered his bid, Hudson agreed with the sheriff (but not with Woodruff's consent) to take the lot of cotton bid off by Woodruff at Woodruff's bid, and that he did take possession of said cotton. To the making of this proof, also, the defendant objected, but his objection was overruled, and the evidence admitted; and to this defendant excepted.

"The defendant then introduced proof, tending to show that,

soon after the rendition of said judgment, and before the levy of an execution upon said cotton, the said Williams secretly left the county, carrying with him his property, which was of value ample to pay said judgment, and that he (defendant) went in pursuit of said Williams, for the purpose of collecting this debt out of him; that he was gone after said Williams some fifteen days; that he furnished his own horse; that his expenses were about two dollars per day, and his services worth five dollars per day; but there was no proof that he ever overtook said Williams or his property. The plaintiff then offered the following deposition of said Williamson Williams" (setting it out at length); "to the reading of which deposition the defendant objected, on the ground that said Williams was interested in this suit, and his deposition was therefore inadmissible; and further, because said testimony was illegal and irrelevant. The objections were overruled, and the deposition allowed to be read; and to this the defendant excepted."

This deposition was taken on interrogatories, of which the defendant's attorneys acknowledged service, and waived notice; adding, however, "But we waive no objection either to the affidavit, or to the legality, pertinency, relevancy, or competency of said interrogatories." The witness testifies, in substance, that the note mentioned in the receipt was given for a part of the purchase money of a tract of land which he had bought of said Raiford; that he left the land unsold, and a crop of cotton growing on it; that he received a letter from Hudson, dated April 1, 1844, "in which he says, 'If you will pay us the amount of the notes we hold against you, we will endeavor to make the judgment in Alabama in some way or other;' the amount of the notes now due is $166 95, interest till paid';" that the notes here referred to were due by witness to S. P. Hudson & Co.; that Hudson was at his house in March, 1845, and witness then paid him $151 on those notes, but said judgment was not mentioned.

"The court charged the jury, among other things, as follows:

"1. That the defendant could only be allowed in this suit such expenses incurred by him as were actually necessary for the preservation of the note described in said receipt, and that he was not entitled to an allowance for either the value

of the use of his horse, or the value of his time in the pursuit of Williams.

"2. That the defendant was not bound to pursue said Williams beyond the limits of this State; and that if he did so, he would not be entitled to recover his actual expenses incurred in such pursuit.

"3. That the defendant should be charged in this suit with the amount of cotton bid off by him, at the price bid by him; and also with the amount of cotton bid off by Woodruff, if they believe from the evidence that he afterwards agreed with the sheriff to take it at Woodruff's bid, and did take it.

"To each of these charges the defendant excepted, and asked the court to charge the jury, that if they believed from the evidence that Hudson did not buy one of the lots of cotton sold at sheriff's sale, but the same was bid off by another, and that on the day after the defendant, by private agreement with the sheriff to pay the amount at which Woodruff had bid it off, took possession of it, then he would not be responsible for that amount in this suit; which charge the court refused to give, and the defendant excepted.

All the rulings of the court set out in the bill of exceptions, as above stated, are now assigned for error.

MORGAN & MARTIN, for the appellant:

1. The court erred in admitting the deposition of Williams. He was directly interested in the suit.—Alexander v. Trask, 20 Ala. 805; Moore & Jones v. Henderson, 18 *ib.* 232; Emerton v. Andrews, 4 Mass. 653; McGrew & Beck v. Governor, 19 Ala. 89; 1 Greenl. Ev., p. 543, and note 4.

2. The levy of an execution on property by the sheriff does not divest the title of the defendant, who may subsequently convey the property subject to the execution.—Atwood v. Pierson, 9 Ala. 656. His title can only be divested by a public sale, under and by virtue of the execution. If the sheriff sells the property at private sale, or disposes of it in any other way than as sheriff, he becomes a trespasser, and no title passes to his vendee.—Ormond v. Faircloth, 2 Hayw. 336; 1 Murph. 35; Andress v. Broughton, 21 Ala. 200. The sheriff having made a disposition of the property unauthorized by law, he became a trespasser *ab initio*. Such is always the

case where there is an abuse of legal process.—The Six Carpenters' case, in 43d vol. Law Library, p. 130; Allen v. Crofoot, 5 Wend. 506.

3. Williams could have maintained trespass against the sheriff, and trover or detinue against Hudson; and yet the court charged the jury, that Hudson must be charged in this suit (which is for money had and received by Crow) with the value of this cotton as evidenced by the price he agreed to pay the sheriff for it; and that, too, in the absence of any ratification of the sale by the owner. Crow's ratification, or waiver, amounts to nothing; indeed, he could not ratify the sale.—Van Dyke v. The State, 23 Ala. It is true that the sheriff would be liable in a proper suit; but this action only lies for money actually received, while not one dollar is shown to have been received; and it is not pretended that the sheriff has treated the sale as a judicial one, by making an entry on the execution in reference to it, nor that Hudson has ever parted with the possession of the cotton.—Crow v. Boyd's Adm'r, 17 Ala. 51; Jones v. Hoar, 5 Pick. 285; Gilmore v. Wilbur, 12 *ib.* 120; Murray v. Pate, 6 Dana's R. 335.

4. Aside from these errors, the charge cannot be sustained. To charge the defendant at all, the sales of the cotton must be held to have been regularly made; and if so, the costs, sheriff's commissions, and attorney's fees should have been deducted, and the defendant charged only with the remainder. Story on Bailments, §§ 306, 357; Trotter v. Crockett, 2 Port. 413; Stocking v. Conway, 1 *ib.* 260; Russell v. Hester, 8 Ala. 535; Cocke v. Chaney, 14 *ib.* 65. These cases show too, that Hudson should have been allowed pay for his time, trouble, and expenses in following the debtor for the express purpose of collecting this debt. The law made Hudson the agent of Crow to collect this debt, and imposed upon him the exercise of ordinary diligence. Laches on his part would have rendered him liable for the whole debt, and a failure to follow the debtor, under the circumstances proved, would have been gross negligence.—See authorities *supra*, especially Cocke v. Chaney, and Russell v. Hester.

5. The testimony in relation to the demand of specie by the sheriff at the sale, was irrelevant, and should not have been admitted. It was well calculated to mislead the jury, and to

prejudice Hudson's defence in their minds. The law required the payment of specie, and nothing else would have been a payment.—Haynes v. Wheat & Fennell, 9 Ala. 239.

6. The doctrine of estoppel cannot be applied to any part of this case, against Hudson and in favor of Crow. Estoppels are mutual, and it is clear that Crow was not (and could not be) estopped by anything appearing in the record; and consequently he cannot set up any of these matters by way of estoppel.—Hudson v. Crutchfield, 23 Ala.

7. Nor can the doctrine of waiving the tort and suing in assumpsit be applied to the case. The right to waive the tort and sue in assumpsit is confined to the legal and real owner of the property as to which the tort was committed, and Crow was not the owner of the cotton. He cannot maintain assumpsit for the cotton bid off by Woodruff, and taken by Hudson at private sale from the sheriff, because there is no contract, express or implied, as between Crow and Hudson.—Crow v. Boyd, 17 Ala. Contracts to pay money are implied only in favor of the legal owner of the money, or of the property wrongfully converted into money.—Branch Bank at Montgomery v. Sydnor, 7 Ala. 308.

WHITE & PARSONS, *contra*:

The proof that Hudson demanded specie for the cotton, and that Woodruff offered to pay in South Carolina funds, was proper to show that the bid was a good one, and that Hudson was offered the kind of funds which Crow was by his contract to pay him. It was competent, also, to show that Hudson had been offered the money, or its equivalent, for the cotton bid off by Woodruff. Woodruff was bound to the sheriff for his bid; and after he had surrendered it, Hudson, who was plaintiff in the execution, cannot be heard to complain that he was permitted to take it at Woodruff's bid. It was as though he had himself bid that amount for the cotton, and a corresponding credit should have been entered on the execution.—Perry v. Williams, Dudley's R. 44; Jones & Hughson v. Burt, 5 Strob. R. 147; Moore v. Barclay, 18 Ala. 673.

Williams was not incompetent as a witness from interest. After the sale of his property, he was discharged to the extent

of the amount for which it was sold, whether entered on the execution or not.—Chenault's Adm'rs v. Walker, 22 Ala. 284; 18 *ib.* 673. But the objection to the deposition was general, and it came too late.

Hudson was the holder of the note, and owner as pledgee. He was interested in recovering the amount, and if he voluntarily assumed to incur expense, in following Williams, he cannot charge Crow with it.—Magee v. Toland, 8 Port. 36. No man can make another his debtor unwillingly. Hudson was not bound to pursue Williams at all. He had not undertaken to collect the note: he only bound himself to account for it, when Crow paid him three hundred dollars; and unless requested by Crow, he was not bound (nor did he have any right) to institute suit upon the note.—Story on Bailments, §§ 200, 274, 306, 358, 389; 2 Murph. 291; 1 H. Black. 83; 1 Term R. 17, 21; 16 Ala. 57.

The pawnee is only answerable for ordinary neglect.—2 Kent's Com. 579. Would Crow have been discharged, if Hudson had rested with suing to judgment and execution? The contract of bailment, even if he was required to sue at all, cannot be said to extend further than this; and if he did more, it was voluntary on his part, and Crow was not bound to repay his expenses in so doing.—Noland v. Clark, 10 B. Mon. 242; Goodall v. Richardson, 14 N. H. 572. When the pledge is a promissory note, the pledgee is only entitled to sue for and recover the money. This is the extent of his power, unless he has notified the pledgor to redeem.—Story on Bailments, § 321; 12 Johns. 149; Cortleyou v. Lansing, 2 Caines' Cas. 201.

Hudson, being plaintiff in the execution, could take Woodruff's bid; and by crediting the execution with the amount, or directing the sheriff to do so, he became liable to Crow for the excess over and above what was due him.—Stewart v. Connor, 9 Ala. 803; Strickland v. Burns, 14 *ib.* 511.

CHILTON, C. J.—The court below did not err in refusing to exclude the deposition of Williams, conceding that he was an interested witness; for it is not permitted to a party, knowing of a witness' interest, to allow his adversary to go on and examine him by deposition, raising no objection on

the ground of interest; thus enabling himself to read the deposition, if it should prove beneficial to his side of the case, but, in the event it should prove detrimental to him, then for the first time to spring the objection at the trial and exclude it. The rule which usually obtains, of not allowing questions to be asked upon a cross-examination which properly belong only to an examination upon the *voir dire*, is founded upon a similar reason—the objecting party ought not to be allowed to speculate upon the testimony of a witness whose interest is known to him. The true rule requires the party against whom an interested witness is offered, to elect whether he will permit him to be examined or not, as soon as the opportunity to make such election is offered; and if he does not do so, he is presumed to waive it forever. He is then said to be "*in mora*", and any subsequent objection on account of the witness' supposed interest comes too late.—1 Greenl. Ev., § 421, and notes, (6th ed.) pp. 529-31.

The defendant's attorneys in this case, when they accepted service of the interrogatories, say they "waive no objection to the legality, pertinency, relevancy, or competency of the interrogatories"; but this raises no objection to the witness' interest, which must be distinctly made, or it is waived. Indeed the inclusion of these is an exclusion of the objection to the witness' interest.

Hudson, by the consent of the sheriff, having been substituted in the place of Woodruff, to take the cotton at the bid of the latter, in lieu of so much money, cannot say that he was committing a trespass, and should not therefore be charged with the price as so much money. We must intend the sheriff did his duty, and made the proper endorsements of credits on the *fi. fa.*; and if the defendant in the execution does not complain, but allows the sale to stand as a satisfaction of the execution, it does not lie in the mouth of the purchaser to make complaints for him. He received the cotton as money, at the price at which it was bid off by Woodruff, and is chargeable with money, as between himself and Crow, to whom he bound himself by his receipt to account.

The proof of a demand of specie by the sheriff, after the cotton was bid off by Woodruff, at the request of Hudson, and the offer of Woodruff to pay in current bank-notes and

to make good the difference, was not illegal. It was explanatory of the circumstances of the sale, and of the manner in which Hudson obtained the cotton, by pushing Woodruff out that he might take his bid. It tends further to show that Hudson took the cotton as money, deeming it more valuable. It was emphatically part of the *res gestæ*.

The objection, that a portion of the proof made by Williams is illegal, is not well taken. It was a general objection to the whole deposition, a portion of which was clearly legal, casting upon the court the duty of sifting the proof in order to separate the legal from that which was not. The court is not bound to do this, and in such cases may properly overrule the objection.

When this case was first before us, the record showed that the judgment against Williams had not been satisfied,—that the sale of the cotton left a balance due, and thereby raised the inference that the cost must be first deducted from these sales. No such facts appear now before us, and hence the opinion then delivered reversing the judgment by reason of a charge to the jury, "that the amount of Hudson's bid for the cotton should constitute the measure of the plaintiff's recovery", does not apply. Hudson is clearly liable to the amount of his bid, as though he had received that much money. If that sum has been lessened by expenses, court costs, or the like, the burthen of showing this was devolved on him; and as the record fails to show any such expense, or any court cost which is a charge on the fund, we should violate a cardinal rule of decision, to travel out of the record and *presume* the existence of such charge to *reverse* the judgment; thus *presuming* against the regularity of the proceedings in the court below.

In relation to the expenses incurred by Hudson "in pursuing Williams when he secretly left the county, taking his property with him", we need only observe, that the bill of exceptions fails to show that such expenses were *necessarily* incurred, or that they are such as Crow would be bound to pay. The record does not purport to set out all the proof, and the fact may be, that Williams left property sufficient to satisfy the judgment. It appears the note was given for land, and the inference is that a lien existed on that for its payment.

Besides, there were eighteen bales of cotton left behind by Williams; whether any more property does not appear. But, however this may be, the party excepting must not leave the court to indulge in presumption as to the necessity for Hudson's pursuing Williams to secure or collect this judgment. All reasonable intendments are the other way, as we have uniformly decided. Hence we might reasonably conclude that Hudson's object in the pursuit was to secure the debt due to him of $166, instead of the judgment; especially since it appears he went to the defendant's residence afterwards, and collected most of it, without even naming the judgment, as appears by Williams' testimony.

Considering the charges with reference to the proof which is set out in the bill of exceptions, we are of opinion they were correct—at least that there was no error of which the appellant can complain. Whether one of these charges, as to Crow's liability for the expense incurred in pursuit of Williams to the State line, is not too favorable for the appellant, is not a question for consideration.

Let the judgment be affirmed.

RICE, J., having been of counsel, did not sit in this case.

HARDY *vs.* HARDY'S HEIRS.

1. The probate of a will, unless contested in the mode and within the period prescribed by the statute (Clay's Digest, p. 598, § 15), is conclusive; and therefore an application to establish a testamentary paper of later date, which is inconsistent with the provisions of the will already probated, cannot be allowed after the expiration of five years, when the applicant does not bring himself within any of the exceptions to the statute.

APPEAL from the Court of Probate of Dallas.

THIS was an application by Rempson R. Hardy, the appellant, to have admitted to probate, as the last will and testament

of Jesse Hardy, deceased, a paper of which the following is a copy:

"State of Alabama, } Know all men by these presents,
Dallas County. } that I, Jesse Hardy, for the natural love and affection that I have for my son Rempson Hardy, and for and in consideration of the sum of one dollar to me in hand paid, at and before the delivery of these presents, by the said Rempson Hardy, I, the said Jesse Hardy, do give, grant and convey to the said Rempson Hardy, at my death, a certain negro boy named Lewis, about fifteen years old. The title to the above-named negro (I) the said Jesse Hardy, do warrant and defend to the said Rempson Hardy, his heirs and assigns, forever, this the twentieth day of December, A. D. 1844. JESSE HARDY [seal].

"In presence of JOHN LEE, witness."

The application was made on the 21st March, 1854, and was finally heard at the succeeding June term, before the judge of probate, by consent of parties, without the intervention of a jury. The evidence adduced on the trial as to the execution of the paper propounded for probate, and as to the decedent's mental and physical condition at the time of its execution, is all set out in the bill of exceptions, but it is unnecessary to state it. The last will and testament of the decedent, which was dated the 8th April, 1844, and admitted to probate on the 18th August, 1845, was also in evidence before the court; and by it the testator disposes of his entire estate, giving his wife the same share that she would take under the statute of distribution, and bequeathing the residue to his thirteen children, to be equally divided among them. Upon these facts, the decision of the probate judge was, "that said paper could not be admitted to probate, because said decedent's estate had been fully administered, and the estate settled under said will, except as to the land; and because said will had not been revoked, annulled, or set aside by a subsequent paper; and to this decision of the court the said proponent excepted."

This ruling of the court is now assigned for error.

GEO. W. GAYLE, for the appellant:

The paper propounded for probate is a will, because it takes

effect upon the donor's death.—Walker v. Jones, 23 Ala. 448; Thompson v. Johnson, 19 *ib.* 59; Shepherd v. Nabors, 6 *ib.* 630; Dunn and Wife v. Bank of Mobile, 2 *ib.* 152.

If the paper is a will, it is no objection that it is a second will. A man can make as many wills as he pleases, and the last shall prevail.—1 Lomax on Ex'rs, p. 48, §§ 1, 3. A second will, in conflict with the first, is a revocation of the first, without an express revocation.—*Ib.*

The fact that the executor under the first will had settled and distributed the estate, with the exception of the land, is no objection to admitting this will to probate.—Norman v. Norman, 3 Ala. 389; Nixon v. Robbins, at this term.

If it be said, on the authority of sections 1654 and 1656 of the Code, that a second will cannot be admitted to probate without the aid of chancery, because five years have elapsed since the first was probated,—the answer is, that the will must be admitted to probate (which has not been done in this case) before those sections apply, and that the appellant is no contestant, but the proponent of the paper.

WM. M. MURPHY, *contra*, contended that the Probate Court had no jurisdiction of the case, and relied on the statute in Clay's Digest, p. 598, § 15.

GOLDTHWAITE, J.—The act of 1806 (Clay's Dig. 598, § 15) provides, that when any will has been admitted to probate, it may be contested by any person interested, by bill in chancery, within five years thereafter, and that unless so contested, it shall be conclusive and binding upon all parties,—extending, however, to infants, married women, lunatics, and persons absent from the State, the right of contestation to five years after the removal of their respective disabilities. Under this statute, the probate is conclusive, unless the will is contested in the mode and within the time fixed.

In the present case, the application is to establish a paper which, if regarded as a will, is inconsistent with the provisions of the one which had previously been admitted to probate; and as it is of later execution, it must operate as a revocation of the former, *pro tanto*. To this extent, therefore, it impeaches the validity of the will which had been established;

and if admitted to probate, the consequence would be, that there would be two wills established inconsistent in their provisions. It was to avoid such consequences, that the statute to which we have referred was enacted. The paper offered for probate impeaches in part the will already admitted to probate, and this, as we have seen, can only be done in the mode and within the time prescribed by the act. The present proceeding is not in that mode; neither is it commenced within the time prescribed, as the record shows that the application was not made until more than five years after the probate of the first will, which disposed of all the property of the intestate, and the applicant did not bring himself within the saving clause of the statute.

The court, therefore, did not err, on this state of facts, in deciding against the application.

Judgment affirmed.

HAMILTON *vs.* WILLIAMS.

1. The rule of the common law, which still prevails except so far as it has been changed by particular statutes, held a judge exempt from a civil suit, or indictment, for any act done, or omitted to be done by him, when sitting as judge.
2. Under the statute which gives an action at law on the official bond of a county court judge, "for any injury, waste, or damage sustained in any estate, in consequence of any neglect or omission of taking good and sufficient security from guardians, executors, or administrators", (Clay's Dig., p. 296, § 1,) no suit can be maintained on his bond for the failure of the judge to require a guardian to renew his bond, or to give further security, on account of the insolvency, removal, &c., of his original sureties.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

This action (which was commenced in August, 1853) was brought by Martha P. Hamilton, wife of William Hamilton, against Thomas M. Williams, to recover $1490 72 dam-

ages, which plaintiff claims as her separate estate, for the breach of the condition of the defendant's official bond as judge of the County Court of Lowndes. The complaint alleged, that plaintiff was a minor at the time of the execution of defendant's said bond, and that one John Powers was then her lawful guardian by regular appointment from a preceding judge of said court; that said guardian's sureties on his official bond became insufficient and insolvent, and removed with their property beyond the limits of the State; that the defendant had notice of these facts, and was requested to require further security from said guardian, but he wholly failed and neglected to do so; that afterwards, on the final settlement of said guardian's accounts, a decree was rendered against him, in favor of plaintiff, for the amount claimed as damages in this suit; that an execution was regularly issued on this decree, against said guardian, and was returned "no property found"; and that afterwards another execution was regularly issued, under the statute, against him and his sureties, which was also returned "no property found."

The court sustained a demurrer to the complaint, and its judgment is now assigned for error.

Geo. W. Stone, for the appellant:

1. It is admitted that no adjudged case has been found, showing that this action can be maintained at common law; although in the matter of taking bonds, it is contended, the judge acts ministerially, not judicially. On principle, he should be held accountable for his omissions of plain and commanded duty.

2. Under our statutes, new liabilities are cast on the judge. Clay's Dig., p. 303, § 31; p. 300, § 21; p. 268, § 5; p. 221, § 5. These statutes clearly enjoin the duties, for the breach of which plaintiff complains.

3. The condition of the judge's bond is, "for the faithful performance of the duties assigned him." The bond in this case conforms substantially to it. Why require a bond? Is it a matter of form? Is it not intended to enforce the performance of his duties, by a penalty?

4. It is said, the omission complained of is not covered by the statute. The last clause is relied on. This statute is

remedial; of public benefit. It must be construed in reference to the mischief intended to be remedied. What was the mischief? The danger that the property of minors and distributees would be lost. Is not the danger equally great from subsequent, as from original insolvency? Can a higher duty rest on the judge, than to require a new bond, when the sureties are known to him to be insolvent?—Winslow v. Kimball, 25 Maine 493; Mason v. Finch, 2 Scam. 223; Wolcott v. Pond, 19 Conn. 597; Woods v. Marin, 1 Greene (Iowa) 275; 17 Verm. 479.

5. But this argument restricts the statute to too narrow bounds. The condition of the bond is for the "faithful performance of all the duties assigned", &c. To require a renewal of guardian's bond, is one of the duties assigned.—See Digest, p. 268, § 5; 221, § 5. If the statute stopped here, there would be a right of action for every failure to perform the commanded duties. The remaining words of the clause, "subject to be sued on", &c., were unnecessary, and are merely cumulative.

6. The argument proves too much. If it be correct, the judge of the orphans' court may take no security from sheriffs, &c., and there is no redress. Was this the intention of the Legislature?

7. The clause relied on does not sustain the argument: it enacts that suit may be maintained to recover for any "damage", caused by "any neglect or omission of taking good and sufficient security from guardians", &c. Is there anything in this language which limits the operation to the taking of the original bond? We contend, it covers new, or renewed bonds, as well as original bonds. The language justifies the construction; and the intention of the Legislature, as gathered from the mischief intended to be remedied, sustains it.

8. The second count complains of the omission of duties, all of which are ministerial—none judicial. If it be argued that we have averred what is not susceptible of proof, we reply, 1st, that proof could be made that the guardian was then in good credit,—the public had confidence in him,—and from this proof the jury would draw the desired inference; 2d, the court will presume the guardian would have renewed his bond, if cited for the purpose.

9. If the averments of the complaint show no right of action, then the condition of wards is deplorable indeed: they are not capable of taking care of their own interests, and, under the age of fourteen, have no voice in the selection of their guardians; their property is placed, without their consent, in the hands of an irresponsible trustee, or rather, one who becomes irresponsible, and they can recover their loss from no person.

10. It may be argued that the Legislature, in employing the word "may", intended to leave it discretionary with the judge to cite the guardian to renew his bond, or not, at his own pleasure. The word *may* means *shall*, when it relates to the performance of official duty, in which the public are interested.—*Ex parte* Simonton, 9 Por. 390, and cases cited; 4 Gilm. 20.

11. The action in this case is correctly brought.—Code, §§ 2130, 2131, 2154.

WATTS, JUDGE & JACKSON, *contra*:

1. It is clear that this action could not be maintained at the common law; for "the doctrine which holds a judge exempt from a civil suit, or indictment, for any act done, or omitted to be done by him, sitting as a judge, has a deep root in the common law." It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions in the English courts, amidst every change of policy, and through every revolution of their government. See the learned and eloquent opinion of Chancellor Kent, in Yates v. Lansing, 5 Johns. 282, afterwards affirmed in the High Court of Errors, 9 *ib.* 395; see, also, Seaman v. Patton, 2 Caines 112; Cunningham v. Bucklin, 8 Cow. 178. And it has been expressly held, that this doctrine is applicable in a suit like the present, against a judge of probate, for omitting to take security from a guardian.—Phelps v. Sill, 1 Day's Conn. Rep. 315. From the characters composing the Supreme Court of Errors of the State of Connecticut, when this decision was made, Chancellor Kent states, in Yates v. Lansing, *supra*, "it is entitled to great consideration." The case of Phelps v. Sill, *supra*, also establishes the position that the taking of bonds of guardians, &c., is not a ministerial, but a

judicial act; and that in neglecting and refusing to take such bonds, "he acts in the exercise of judicial power", and cannot be questioned therefor in a civil suit. See, also, the argument of counsel on both sides, in said case of Phelps v. Sill.

2. The action not being maintainable at the common law, the question then arises, can it be maintained under any statute of this State? The condition of the bond is, "for the faithful performance of the duties assigned him." From the condition of the bond, if nothing more had been said in the act, it might be contended that such judge was by implication liable upon the bond for "the faithful performance" of every official duty. But the act, in this regard, leaves nothing to implication, but states that such bond shall be "subject to be sued on by any person or persons, for any injury, waste, or damage sustained in any estate, in consequence of any refusal or omission of taking good and sufficient security from guardians, executors, or administrators." Specifying thus the only case in which the bond "shall be subject to be sued on", in no other case can it be; for, "*expressio unius est exclusio alterius.*" Is this a suit, then, for "neglect or omission of taking good and sufficient security?" It is not, for the guardian was appointed, and the security taken, by the predecessor of the appellee in the office of judge of the County Court. The statute above relates to the original taking of good and sufficient security: this is the obvious import and construction of the statute; and it being in derogation of the common law, it is to be strictly construed. (See Chancellor Kent's construction of *habeas corpus* act, in this connection, 5 Johns. 282, *supra*.) What, then, is this suit? It is to recover against the appellee for having failed, neglected, and refused, as county-court judge, to issue a citation against the guardian in the pleadings mentioned, and to take proof showing that his (the said guardian's) sureties had become insufficient, as he might have done under the statute in Clay's Digest, pp. 221-2, § 5. For neglecting or omitting to do this, no right of action on the bond is given by the statute. If the judge failed to perform this duty on notice or request, the remedy was by *mandamus* to compel him to do it; and by a failure to apply for the appropriate remedy, if loss or injury ensues, it is the misfortune of those who sustain it. The judge could order new and further se-

curity only upon notice, and on proof of "gross neglect", or on proof that the securities had become insufficient, &c.—Clay's Digest 221-2, § 5. If the proceeding be under Clay's Digest 268, § 5, still a judicial investigation would have to be had, and proof to be made.

3. But it is said, that the establishment of this position might operate greatly to the detriment and injury of wards, they having no one to represent them but their guardians. This argument destroys itself; for to hold it to be good, this court must decide that a probate judge, under the penalty of a forfeiture of his bond, is bound, *mero motu*, to examine from time to time all guardians' bonds in his office, as well those taken by himself as by his predecessors, and also to examine into the condition of the sureties thereto, and whether their circumstances have changed, or are changing, and to issue citations and remove, or require additional sureties. Hard would be the position of a probate judge, if such were to be his duties and responsibilities! But such are not his duties and responsibilities; he is not bound to act, unless upon motion or request; the person who makes the motion or request can also move for a *mandamus*, or other appropriate remedy, if the judge fails or refuses to act; and if the judge is actuated by corrupt motives, can have him indicted or impeached; and it it is an extreme and improbable case, to suppose that a ward would have no friend or relative to act for him in a proper case.

CHILTON, C. J.—The statute requires, that the bond of the county judge shall be executed, payable to the Governor and his successors in office, and "conditioned for the faithful performance of the duties assigned him"; and further provides, that it "shall be filed in the office of the Secretary of State, subject to be sued on by any person or persons, for any injury, waste, or damage sustained in any estate, in consequence of any neglect or omission of taking good and sufficient security from guardians, executors, or administrators."

The present action is on the judge's bond, for failing to require the guardian of the plaintiff to renew his bond, or to give further security,—that which he had previously given having become insufficient by reason of insolvency and removal, &c.

The question is, whether, under the statute, an action lies for such a supposed breach.

Another section (§ 14) of the same statute which gives the action, as above stated, provides, that the guardian may be ordered to give further security, on proof that his sureties have become insufficient.

It is insisted by the counsel for the appellee, that the ordering of further security is a judicial, not a ministerial act; and they invoke the common-law rule, the correctness of which we acknowledge to the fullest extent, "that a judge is exempt from a civil suit, or indictment, for any act done, or omitted to be done by him, sitting as a judge."—Yates v. Lansing, 5 Johns. 282-91, and authorities there cited,—affirmed in 9 Johns. 395. The wisdom and sound policy of this rule is apparent to every one who has correct views of the administration of justice; for, if a judge is liable to answer in a civil suit for his judicial acts, for every judgment he renders, at the instance of every party, who, blinded, it may be, by self-interest and partiality for his cause, but excited by the mortification of defeat, may see proper to sue him, he might be overwhelmed in litigation; the citizens would soon lose all respect for the law and reverence for those who administer it; indeed, the independence of the judiciary, the great conservative department in every well-regulated government, would be destroyed, and no man would hold the office of judge, at the peril of being thus arraigned for every judgment he pronounces.—See Groenvelt v. Burwell, 12 Mod. 386; 1 Salk. 396; 1 Ld. Ray. 454.

Such was (and still is) the salutary common-law rule, except so far as the same has been changed by our statutes.

The statute before us, notwithstanding the general terms used in the condition of the bond, "for the faithful performance of the duties assigned him", specifies and points out the instances in which the bond may be put in suit. It is "subject to be sued on by any person, or persons, for any injury, waste, or damage sustained by any estate, *in consequence of any neglect or omission of taking good and sufficient security from guardians*", &c. This latter clause in the section is supposed by the counsel for the appellant to be mere redundancy; but we think it has an important office to perform. It prescribes the cases in which the bond may be put in suit; and by thus

particularizing the instances in which an action may be maintained upon it, its effect is, to limit the operation of the statute to these particular cases, upon the maxim, "*expressio unius exclusio alterius.*" If the judge, after having appointed a guardian, neglects or omits to take sufficient security, he is liable to be sued on his bond, if injury ensue to the ward in consequence thereof. But suppose, when application is made to him for the appointment of a guardian, he should, in his official capacity as judge, determine not to appoint one, and adjudge that the appointment pertained to the judge of another county, or that the property of the ward was within another jurisdiction; now, however erroneous such a decision might be, it could not be pretended that the statute was designed to cover such case, or that by the common law the judge could be held responsible. In the case just supposed, he omits to take security; but this omission is the result of his judicial action in deciding against the appointment of a guardian. It is clear, therefore, that in order to maintain an action upon the bond in such case, for the omission to take security, the judge must be held responsible for an erroneous decision *as judge*, in failing to appoint a guardian that he might take from him security. The case supposed, we think, furnishes, in principle, a fit illustration of the case before us. As in that case, the plaintiff, in order to arrive at the omission which would constitute a breach of the bond, as defined by the statute, must impeach the judicial action or omission of the judge *as judge*; so here, as the judge, in his judicial capacity, must first make an order requiring further security from the guardian, and had no right to remove him or discharge the old securities by the acceptance of a new bond, without such previous order, the omission or neglect to require or take security involves an inquiry into a judicial omission—the failure to hear proof and pass an order for further security, or on failure the removal of the guardian. It is obvious, therefore, that the *gravamen* of the complaint is the judge's omission to discharge a judicial, not a ministerial function. It is not the neglect or omission of taking good and sufficient security merely which is the burthen of the complaint, but the failure of the judge to order the guardian to give such security, which order must be made and decided upon proof of the

insufficiency of the sureties already on the bond, and thus involves a judicial investigation. The statute not embracing such omission of the judge, and the failure to take good security being dependent on it, no action lies for the failure to take such security. If the order had been made, and the judicial function involved in its adoption had been discharged, we are not prepared to hold that the judge would not be liable on his bond for failing to take good security upon such order, equally as if he were taking security in the first instance. It would certainly fall within the mischief intended to be remedied by the statute; but until then, the breach contemplated by the statute does not accrue, and cannot. If the judge erroneously refuse to act, upon complaint for further security, there is a remedy by *mandamus*; if he corruptly refuse, or is guilty of malversation in office, the constitution and the statute (Code, § 685) point out the remedy; but neither the common law, nor the statute, makes him liable to a civil suit for his acts or omissions done as a judge.—Phelps v. Sill, 1 Day's Rep. 315.

Our conclusion is, that the demurrer was properly sustained to the complaint. The judgment must consequently be affirmed.

HOFFMAN *vs.* HOFFMAN ET AL.

1. The Legislature has the power to prescribe rules for the execution of wills, whether made before or after the passage of the statute, if rights have not become vested by the testator's death.
2. Courts will not so construe a statute (when its words do not force them) as to defeat a devise or bequest, which would have been valid if the testator had died immediately after making it; but *contra*, as to a statute whose effect is to sustain rather than to defeat a bequest.
3. Section 1611 of the Code (which requires two witnesses to a will disposing of either real or personal property) applies to a will of realty executed before the adoption of the Code, if the testator died since its adoption; but a will of personalty only would be governed by the old law.
4. It is not necessary that the witnesses should sign the will in the presence of each other.

APPEAL from the Court of Probate of Macon.

IN the matter of the last will and testament of Jacob Hoffman, deceased, which was propounded for probate by the appellees, and contested by the appellant. The paper propounded for probate was dated the — day of January, 1848, and was attested by two witnesses, who attested it at different times, and not in the presence of each other; and the testator died on the 15th February, 1853. The court charged the jury, in substance, that under these facts the will was valid as to the personalty, and invalid as to the realty; and to this charge the contestant excepted.

This charge of the court, among other things, is now assigned for error.

J. E. BELSER and SEABORN WILLIAMS, for the appellant:

1. "It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated look forward, not backward, and are never to be construed retrospectively, unless the language of the act should render that indispensable." No words are found in the Code, in relation to wills, "which render this odious construction indispensable."—Ladiga v. Roland, 2 How. (U. S.) Rep. 589; Reynolds v. McArthur, 2 Peters, 434.

2. "The law authorizes the testator to make his testament, but it is only on the condition that he complies with its regulations; if he does not fulfil the conditions, the dispositions he makes, not having been authorized by law, are of course null and without any efficacy whatever."—2 Bouv. Inst. 444-5.

3. The law which was of force at the time a will may have been written, dated, signed, witnessed, and published, must determine its efficacy or inefficacy as a will, and must also determine whether it was duly executed, and whether it shall or shall not be admitted to probate: for it is that law alone which authorized the testator to make the testament, and prescribed the requisites of the will, and the regulations with which a compliance was essential. "The old testamentary law still applies to all wills made before the Code took effect, whatever be the period of the testator's decease."—1 Jarman on Wills (mar. p.) 567, 628-32, 616-28, 147, 122, 108; 5 Watts

399; 15 Conn. 274; 4 Greenl. R. 134; Alston v. Coleman, 7 Ala. 795; 5 Watts & Serg. 198; Atwood's case, 21 Ala. 625; 3 Call's R. (top p.) 251; Boyce v. Holmes, 2 Ala. 57; 9 Ired. L. 288. "All men are presumed to make their wills, deeds, or contracts, with reference to the existing laws, unless the contrary is clearly expressed."—Alston v. Coleman, 7 Ala. 795. The Code does not profess to operate on past transactions, or to give to facts a character which they did not possess at the time they took place, or to declare that, in the trial of causes depending on such facts, they shall be considered and allowed to operate in the decision of such causes, according to their new character. It does not profess to settle rights depending on laws as they existed for a long series of years before the Code took effect, by new principles which, for the first time, are introduced by its provisions. It does not profess to convert into a will, by mere legislation, those acts which, when they were performed and before the Code took effect, did not amount to a will.—Code, §§ 1589 to 1613, inclusive. The Code cannot be considered as creating a new rule for the government of the past case, or as declaring the interpretation of the former statutes for the direction of the courts. If we call our attention to the general sense of mankind on the subject of retrospective laws, it will afford us the best reason to presume, out of respect to the law-giver, that the Code was not meant to act retrospectively; "and although the tense used, according to the strict rules of grammatical construction, may seem to regard the past, yet (we must remember) this often arises from considering events, then future, as past in reference to proceedings provided for and regulated, which must necessarily succeed these events in the order of time. This results as well from the imperfection of language, as from a want of attention and accuracy in the use of it."—Crofton v. Ilsley, 4 Greenl. R. 139; 2 *ib.* 288; 7 Johns. 500-3; Code, § 1611.

Let us test the construction contended for by the proponent of this will. Suppose that after the testator and both witnesses signed the will, but before the Code took effect, the testator had become insane, and that his insanity had continued without intermission until his death in February, 1853; could the efficacy of the will be determined by the Code? Could lands acquired after the signing of the will by the testator

and both witnesses, pass by the will?—10 B. Mon. 1; 5 Watts & Serg. 198, and cases there cited, which show that "a devise of real estate is in the nature of a conveyance." "Lands can only pass by a particular mode of conveyance."—3 Call's R. (top p.) 263, *supra*.

The language of the New Hampshire and Massachusetts statutes, construed in 2 Foster's R. 434, 445, and in 12 Mete. R. 169, is unlike the language of our statute. But the language of our statute is like that found in the Connecticut statute, noticed in 15 Conn. Rep. 274, and also in 2 Foster's R. 448.—Code, § 1589. Our own court has endorsed (in Boyce v. Holmes, 2 Ala. 57) the English cases, which are repudiated by the New Hampshire court. By the laws of Massachusetts, New Hampshire, and all the other States, the probate of a will is conclusive as to real and personal estate.—Osgood v. Breed, 12 Mass. 531.

There is a clear distinction between the due execution of a will, and its admissibility or non-admissibility to probate, on the one hand, and the construction or meaning of a will after it has been duly admitted to probate. This distinction renders the decisions reported in 2 Foster's Rep. 434, and 12 Mete. Rep., and others relied on by proponent, unavailing for him: for in those cases, the wills had been duly admitted to probate, and the questions presented for decision related to the mere construction of wills which by their probate had been already conclusively decided to be duly executed and admissible to probate. But in this case, the questions are, was this will duly executed—shall it be admitted to probate—as a will of realty and personalty? is it a will of realty? is it a will of personalty? These questions must be determined by the old law.—3 U. S. Dig. 670, § 28.

It is conceded, that the law existing before the Code went into effect did not make it essential to the validity of a will of personal estate that there should be any subscribing witness. But this is one of that class of cases "in which something more than a mere compliance with legal requirements was necessary to the efficacy of the will, by the testator himself; he having chosen to prescribe to himself a special mode of execution." The rule in such cases declares, "if the testator afterwards neglects to comply with the prescribed

formalities, the inference to be drawn from these circumstances is, that he had not fully and definitely resolved on adopting the paper as his will." If this presumption is not rebutted by some extrinsic evidence of the testator intending the instrument to operate in its subsisting state, it cannot be admitted to probate.—1 Jarm. on Wills (mar. pp.) 93-4, 97-8; Avery v. Pixley, 4 Mass. 460-62.

The application of this doctrine to the evidence in this case compels the rejection of the will. It was written in January, 1848, when the testator was at home and in usual health. The testator then signed it, and Smith subscribed his name as a witness in his presence. No other person was then present. Still the testator did not regard it as complete; he intended something further to be done to complete its execution, as is proved by his calling on Wright sometime afterwards "to come to his house to witness his will." Wright went and wrote his name as a witness in the presence of the testator,—no other person being present except testator's family. Testator produced the instrument, and told Wright "it was his will, and acknowledged his signature," before Wright signed as a witness; and after this declaration of the testator, Wright signed as a witness. There is no evidence that the testator, after Wright became a witness, regarded the execution as then complete; but there is strong evidence to the contrary: for the will directs the division of all his estate, "both real and personal," in such manner as to prove clearly, that what he approved of was a disposition or division, in the prescribed manner, of the entire estate, real and personal; and that such a disposition of property as the will made was only approved by the testator when it carried the whole estate, real and personal. He lived about four years after Wright had signed as a witness, in the same county of Macon, and there is no evidence that he was afflicted or confined to his residence until about the time of his death in February, 1853. Under these circumstances, it must be presumed that he knew, if the paper in its unfinished state was good for any purpose, it would only be good as to his personal estate, and that, therefore, he did not intend it to have any validity whatever, until made complete by the attestation of the requisite number of witnesses to carry the real, as well as the personal estate.

The proof is clear that he designed to have more than one witness to the instrument; for after Smith had signed, he called on Wright to come to his house "to witness his will." Why should he thus show a determination to have more than one witness? The obvious answer is, he knew the will could not be valid as to the realty without three witnesses; and after obtaining two he kept the instrument under advisement, because "the settled purpose of mind to pass his property did not then exist."—Bolling's Heirs v. Bolling's Ex'r, 22 Ala. 826.

The declaration made by the testator to Wright, that "it was his will", is of no weight. It was made before Wright signed as a witness, and yet he was then about to get Wright as a witness. Such declarations of testators are not always implicitly to be relied on, "and can never, standing singly, supply proof of due execution, or consequently of what is to be taken in lieu of it. In common parlance, a man may well say that he has made a will, when he has *written* a testamentary paper, though unfinished."—1 Jarm. on Wills (mar. pp.) 94-5.

If the Code governs the questions now presented for decision, still the will is not duly executed, and ought not to be admitted to probate, either as to realty or personalty. The two witnesses signed their names at different times, and each in the absence of the other. The instrument is incomplete, and never became the final testamentary disposition of the testator.—Dormer v. Thurland, 2 P. Wms. 506; 1 Jarm. on Wills (mar. pp.) 71-2; Swift v. Wiley, 1 B. Monroe 117-18; Ragland v. Huntingdon, 1 Ired. L. 561.

CLOPTON & LIGON, *contra*:

1. So far as relates to the manner of attestation, there is no material difference between the phraseology of the statute 29 Car. II, and our own statute, either as it existed previous to, or since the adoption of the Code.—Clay's Dig. 597, § 1; Code, § 1611. So that, whether the execution of this be determined by the law in force at the date of the will, or at the time of the death of the testator, makes no difference in respect to the manner of attestation. Our Legislature, having adopted the statute of 29 Car. II, has also adopted the settled construction of that statute by the courts of England.—2 Ala. 625. That settled construction is, that the witnesses need not see

the testator sign the will; his acknowledgment is sufficient. Grayson v. Atkinson, 2 Ves. Sr. 454, and note 1; Ellis v. Smith, 1 Ves. Jr. 16; 1 Jarm. on Wills (top pp.) 70-1, and note o; Gryle v. Gryle, 2 Atk. 176; 5 Phil. Ev., notes in appendix, 295.

"Where the testator owns his hand before the witnesses, who subscribe the will in his presence, the will is good, though all the witnesses did not see the testator sign; and it is observable, that the statute of frauds does not say the testator shall sign his will in the presence of three witnesses, but requires these three things: first, that the will should be in writing; secondly, that it should be signed by the testator; and, thirdly, that it should be subscribed by three witnesses in the presence of the testator."—10 Bac. Abr. 490-91. "A will of real estate, executed in the presence of two witnesses, and at the distance of four years afterwards, the testator re-executed his will by drawing a pen on the old stroke in the presence of one other person, who likewise subscribed his name as a witness, held properly executed according to the statute."—*Ib.* 492.

The American cases, with few exceptions, have concurred in and adopted the English construction.—Dudley v. Dudley, 3 Leigh 442; Adams v. Field, 21 Verm. 256; 3 A. K. Mar. 146; 2 Barb. Ch. 53; 9 B. Mon. 28; 10 Metc. 54; 17 Pick. 373. The decision in New Jersey is founded upon the peculiar language of their statutes; and it is certainly worthy of remark, that, whilst some other States have changed the verbiage of their statutes in this respect, no alteration has been made in our new Code.

2. A will, to be valid, must be executed according to the form prescribed by the law at the time of the death of the testator, and not the law in force at the date of the will.—Elcock's Will, 4 McCord 39. The cases which maintain a contrary doctrine all revert to the case of Gilmore v. Shuter, 2 Mod. 310, which does not decide this principle. That case was upon a contract, made before the statute of frauds, and a right of action had accrued. It is admitted, that an act of the Legislature will not be so construed as to give it a retrospective effect, where vested rights are to be affected, unless such intent is clearly expressed. But where there are no

vested rights, (as in case of a will before the death of a testator,) the Legislature clearly has the power to enact a retrospective act; and, further, a statute which operates upon wills made before its enactment is not a retrospective law, within the meaning of the constitution.—Holbrook v. Finney, 4 Mass. 568; 16 *ib.* 59; 3 Pick. 360, 363; 12 *ib.* 539.

By section 1592 of the Code, "every devise made by a testator in express terms of all his real estate, &c., must be construed to pass all the real estate he was entitled to devise at the time of his death." By what law is it to be determined whether a will made in Alabama before the adoption of the new Code, but where the testator died after the Code went into operation? In those States (except, perhaps, Pennsylvania) where it is maintained that wills must be governed by the law at their date, their statutes evidently contemplate wills made after their passage. Thus, in North Carolina, "no will in writing made after the 4th July, 1844," &c.; in Connecticut, "any person *may* by such will devise", &c. Or else, the statute expressly exempts wills made before its adoption, as in New York, and 1st Victoria. "A will", says Chancellor Walworth, "does not take effect from its date, but only from the death of the testator." "The validity of the trusts and provisions of a will must depend upon the law as it was when the will took effect by the death of the testator."—De Peyster v. Clendening, 8 Paige 304; Adams v. Wilbur, 2 Sumner 271; Hardy v. Toney, 20 Ala. A statute passed after the making of a will, but before the death of the testator, will operate upon the will.—2 Foster 434; 4 Hill 138; 12 Metc. 169; *ib.* 262.

By these cases, the principle is clearly and ably maintained, that whether after-acquired estate will pass by a will must be determined by the law in force at the death of the testator. This is upon an analogous principle: "Where an action was brought to recover a debt more than six years old, and in order to take the case out of the statute, the plaintiff gave in evidence a verbal promise made in February, 1828,—*it was held*, that the plaintiff could not recover, because the statute of Geo. IV., adopted in May, 1828, required the promise to be in writing.—9 Bacon's Abr. 222. That statute only regulated the manner in which subsequent promises should be proved; it was a question of evidence. Likewise is the manner of

attesting a will: it is required to obtain certain proof of its proper execution, and that it is the will of the testator.

It seems strange to assert, that whether a will shall be admitted to probate must not be determined by the law in force at the death of the testator, but by a law which was repealed before his death.

Whether the testator intended any further act to complete the will, must be determined from the face of the will. No intentional incompleteness appears upon the face of this. It does not appear that he even intended to have it attested at all.—McGrew v. McGrew, 1 Stew. & Por. 30; Hilliard v. Buford's Heirs, 10 Ala. 982.

GOLDTHWAITE, J.—The legal questions presented for our determination arise upon these facts: In January, 1848, Jacob Hoffman executed a paper purporting to be his last will, by which he bequeathed one third of all his property, real and personal, to his wife for life, and at her death to certain of his children who are named in the instrument; and the remaining two thirds of his property to be equally divided among certain of his children, who are also named. There are other provisions, which it is unnecessary to notice, as they have no bearing on the points involved. The writing has an attestation clause, and was published by the testator before two witnesses, who subscribed their names as such; the publication being made and the witnesses attesting at different times, and in the presence of the testator, but not in the presence of each other. Jacob Hoffman died in February, 1853; and upon these facts, the sole question is, whether the instrument is valid as a will of both the real and personal property, or of either the one or the other.

That the instrument is not effectual as a will of real estate, under the law in force at the time of its execution, (Clay's Dig. 596, § 1,) which required three attesting witnesses, is conceded; but at the time of the testator's death, this act had been repealed, and by the law then in force, but two witnesses were required.—Code, § 1611. Assuming, for the present, that the instrument was duly executed under the new law, the only question is, which of the two statutes governs. The Legislature unquestionably have the power to prescribe rules

for the execution of wills, before a right has been vested in the devisee, legatee, or heir, by the death of the testator; and it was, therefore, entirely competent for them to fix the number of witnesses which were essential to the validity of any will, whether made before or after the passage of the statute; and in this aspect, the question is one of statutory construction simply. Does section 1611, which provides that no will shall be effectual to pass real or personal property without two witnesses, embrace wills made before the passage of the act?

In Gilmore v. Shuter, 2 Mod. 310, it was held, that the statute 29 Car. II, c. 3, which made certain agreements void unless in writing, did not extend to parol agreements made before its passage; and the court assimilates it to the case of a will made before the statute, which (the judges say) would be good, although not made in pursuance of it. So, in Ashburnham v. Bradshaw, 2 Atk. 36, where the question arose upon a devise to charitable uses, made before the mortmain act, it was held by Lord Hardwick, that the act did not apply to wills made before its passage, although the testator died after it took effect; and in the case of The Attorney-General v. Andrews, 1 Ves. Sr. 224, the same doctrine as to the application of that act to wills made before its passage was re-asserted. The principle which we extract from these decisions is, simply, that where the words do not force them, the courts will not construe a statute so as to defeat a will or bequest which would have been valid, had the testator died immediately after making it; and to that extent we regard them as authority. But it does not follow, that if the effect of the statute was to sustain, rather than invalidate—to save, rather than to destroy—the same rule of construction would have been adopted. In many of the States, the artificial rule which prevented a devise, no matter in what words expressed, from passing lands subsequently acquired, has been changed by statute providing that the real estate acquired by the testator after the execution of his will shall pass by general words, unless a contrary intention appear on the face of the will; and in New York, Massachusetts, and New Hampshire, it has been held, that these statutes extended to every case where the testator died after they took effect; thus giving to them, in one sense, a retro-active operation.—De Peyster v.

Clendening, 8 Paige 295; Bishop v. Bishop, 4 Hill (N. Y.) 138; Cushing v. Aylwin, 12 Metc. 169.; Pray v. Waterston, *ib.* 262; Loveren v. Lamprey, 2 Fost. 434.

It is true that the courts of Pennsylvania, Connecticut, and North Carolina have confined the operation of similar statutes to devises made since their passage; resting their decisions on the cases of Gilmore v. Shuter, and Ashburnham v. Bradshaw, *supra*, and the general rule of construction against the retro-active operation of statutes.—Mullock v. Souder, 5 W. & S. 198; Brewster v. McCall, 15 Conn. 274; Doe v. Speight, 9 Ired. Law 57. With all deference, we think the error of these decisions arises from mistaking the true principle of the cases on which they rest, and giving too much force to the rule of construction. The object of the Legislature was, to preserve and give effect to the intention of the testator, by abolishing a purely technical rule, which too frequently defeated it. Whenever a statute is levelled against an abuse, or in furtherance of an acknowledged principle of right and justice, every reason exists for its most liberal application; and in such cases, it may fairly be presumed, that it was the intention of the Legislature that the boon of the statute should be extended to every case which its words could properly include.

We do not say, that section 1611 of the Code, in its operation on wills of real estate made before it took effect, furnishes as strong an illustration in favor of the rule of construction for which we contend, as the statutes to which we have referred, giving effect to devises; but the same principle applies in each case. The old law required three witnesses; but the Legislature has said, in effect, that this number is more than is necessary—that two are sufficient. If the statute had increased the number, and thus superadded a condition, we should then say, as the Court of King's Bench said in relation to the statute of Car. II, that it applied only to wills made after its passage; but when its object is, not to abridge, but to enlarge the privileges of the testator, and to give effect to his will, then it falls within the principle by which devises, made in words which, by Legislative construction alone, include lands subsequently acquired, are extended to wills made before the law took effect. The purpose of the statute was for the prevention of fraud; and if the Legislature have said

that two witnesses are enough to accomplish this object, and have not limited its application, why should courts do it? The fair presumption is, that it was intended to meet every case to which the provisions of the section could legitimately extend; and giving effect to this intention, we must apply it to every will of real estate, where the testator died after the Code went into operation. In relation to wills of personal property, a different rule prevails; for, in respect to them, the operation of the statute is to abridge the right of the testator, and upon the authority of Gilmore v. Shuter, and Ashburnham v. Bradshaw, *supra*, they would be governed by the old law. In the present case, however, the record shows that the will was established by two witnesses, which is all the former law required.—Johnson v. Glasscock, 2 Ala. 218.

In reference to the objection which was urged in argument, that the witnesses, although they signed in the presence of the testator, did not attest the will in the presence of each other, it is only necessary to observe, that the statute does not require this in terms; and although some of the earlier cases seem to have thought it necessary under the statute of Car. II, c. 3, the language of which is in this respect almost identical with our own, (Cook v. Parsons, Prec. in Ch. 184; Dormer v. Thurland, 2 P. Wms. 506,) the contrary was expressly ruled in Smith v. Codron, 2 Ves. Sr. 455, which decision has been followed both in England and the United States.—Grayson v. Atkinson, 2 Ves. Sr. 454; Westbeech v. Kennedy, 1 Ves. & B. 362; Wright v. Wright, 5 M. & Pay. 316; Dewey v. Dewey, 1 Metc. 349; 4 Kent's Com. (5th ed.) 516.

The will being perfectly executed, both in relation to the real and personal property, the charge of the court, which declared it void as to the former, was erroneous.

Judgment reversed, and cause remanded.

RICE, J., having been of counsel, did not sit in this case.

OWEN *vs.* SLATTER ET AL.

1. A sale of real estate by commissioners under an order of the probate court, does not affect the widow's right of dower; and although the order was made on her application as administratrix, her failure to announce at the sale that the land was sold subject to her dower, does not estop her from asserting her claim.
2. The statutory jurisdiction conferred on the courts of probate, in the allotment of dower, does not take away the jurisdiction of chancery; and if the widow proceeds in equity for lands in which dower cannot be assigned by metes and bounds, she is not compelled to include in her application all the lands in the county in which she is entitled to dower.
3. In the computation of time under a statute, the settled practice in this State is, to include one day and exclude the other, unless the statute requires so many entire days to intervene; and therefore, under the act of 7th February, 1843, (Clay's Digest, p. 329, § 93,) which limits actions for the recovery of lands to ten years after the accrual of the cause of action, a suit commenced on the 7th February, 1853, is not barred.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. WADE KEYES.

THIS bill was filed by Mrs. Louisa S. Owen against Hope H. Slatter and Mrs. Ann P. Holly, on the 7th February, 1853, to obtain an assignment of her dower in certain city lots in Mobile, of which George W. Owen, her deceased husband, died seized and possessed, and which were sold on the 15th February, 1841, under an order of the Orphans' Court of Mobile, on the application of complainant as administratrix of her deceased husband; and at this sale E. Lockwood became the purchaser, and afterwards conveyed by deed to the defendants. The defendants, in their answers, set up the proceedings in the Orphans' Court in bar of the complainant's claim; insisting that there was no reservation of her dower at the time of the sale, and that they purchased without notice of her claim. They also pleaded the statute of limitations, and demurred to the bill for want of equity; and in their amended answers they allege, also, in bar of the relief sought by the bill, that said decedent died seized and possessed of other lands in this State than those described in the bill, and that complainant is entitled to dower in them.

On final hearing, the chancellor dismissed the bill, and his decree is now assigned for error.

JOHN T. TAYLOR, for the appellant:

I. The statute of limitations is no bar to the action; because

1. The action for dower is not embraced in the general statute referred to.—Park on Dower, p. 11; Angell & Ames on Limitations, p. 379; Guthrie and Wife v. Owen's Heirs, 10 Yerg. 339; 1 Dev. & Bat. Law R. 213; 1 Dudley's (Ga.) R. 123; Wells v. Beall, 2 Gill & J. 468; Barnard v. Edwards, 4 N. H. 107.

2. But, if it were embraced, the time had not expired when the bill was filed. The filing of the bill was the commencement of the action.—1 Paige's Ch. R. 564; 1 Greenl. Ev., § 431. The act was passed on the 7th February, 1843, and the bill was filed on the 7th February, 1853; while the ten years prescribed by the statute did not expire until the 8th February, 1853.—Angell & Ames on Limitations, p. 50; Fairbanks v. Woods, 17 Wend. 329.

II. The complainant is not estopped from asserting her right, by her mere silence in not announcing it at the sale; because, 1st, the answers do not allege enough to make out an estoppel; and, 2d, because the purchaser at the sale bought only the interest of the heirs, and the law implies notice of the widow's right of dower unless it is announced that her dower is included in the sale.—2 Comstock's R. 245; 1 Selden's R. 401.

DANIEL CHANDLER and ROBT. H. SMITH, *contra*:

1. The answers (which are admitted to be true) allege, that "there was no reservation in the decree of any claim of dower, nor was there any at the sale; that the sale was made unconditionally, for a fair and adequate price; that defendant was ignorant of complainant's claim for dower, and had no knowledge or notice of the claim from any person, either at the time of his purchase, at the date of his deed, or when he paid the money"; and that "he had fully performed every act to complete the purchase, before he had any notice of complainant's claim, or any cause to suspect or believe that she had a claim." How then can it be contended that they

purchased with notice of the dower right? They believed they were getting a good title, and paid full value for it. Mrs. Owen knew this, and it was her duty to give notice of her claim; and her silence, under such circumstances, was a fraud upon the defendants, who are innocent purchasers, without notice, for valuable consideration.—1 Rand. 354; Sugden on Vendors, p. 762; 1 Rich. 222; 6 Johns. Ch. 200; 5 *ib.* 187; 1 Rich. 237; 5 Humph. 96; 1 Story's Eq. 375-80; 2 *ib.* 736. Mrs. Owen applied as administratrix for the sale of the land, instead of the negroes as the will directed; she obtained the order, sold the land, interposed no claim for dower, gave no notice of any claim; she received the proceeds, and enjoyed the property, and now demands dower in the only land that was sold. If she failed to retain the value of her dower out of the proceeds of the sale, or to apply for it, it was her own fault, and she can blame no one else. That she was entitled to compensation out of the proceeds of the sale, see 4 Paige's Ch. R. 97; 6 Johns. Ch. 200.

2. The statute (Clay's Dig., p. 173) evidently contemplates that the widow, when she claims dower, shall assert her claim at one and the same time to all the lands of which she is dowable; and even if the lands lie in different counties, she may embrace them in the same petition. Here she claims dower in but two lots only, while the answers show that she has other lands in her possession of which her husband died seized and possessed. Independently of the statute, it is the object of chancery to prevent a multiplicity of suits—a division of claims. If she has a right to dower in these other lands, she ought to have asserted it; and if she intends to abandon her claim to dower in the lands which were not sold, she ought certainly to abandon it in lands which she sold, and to which she induced the purchaser to believe he was getting a good title. "The widow's dower must be assigned her out of the whole inheritance, and not by piece-meal."—1 Pennington's (N. J.) R. 281.

3. The statute of limitations is a complete bar to the suit. It is an action for the recovery of lands, as she is put in possession on her dower being assigned; and is, therefore, within the statute.—6 Johns. Ch. 199. The suit was not commenced within ten years from the passage of the act of 1843: the ten

years expired the day before the bill was filed. To bring it within the ten years, the day on which the act was passed must be excluded from the computation; whereas a statute takes effect from the moment of its passage, and has relation to the first moment of that day, as divisions of a day are not allowed.—20 Vermont R. 654.

4. But if the statute is not applicable to claims for dower, equity will consider such a stale claim barred by analogy to the statute. Complainant has acquiesced in the sales for fourteen years,—has seen the property improve in value, and has enjoyed the advantages of the sale.—7 How. U. S. R. 234; 10 Ves. 453-67; Adams on Eq., m. p. 228; Jeremy's Eq., p. 46.

CHILTON, C. J.—1. The sale of the real estate, made under decree of the Probate Court, vests in the purchasers only the title which the ancestor had, and which upon his death descended upon his heirs-at-law. The widow's right to dower is unaffected by the sale, unless, indeed, she bars her right by some act which, in a court of equity, would constitute it a fraud in her to insist upon it.

The facts of the case before us do not make out such a bar. True, the widow in this case is administratrix; but the law prescribes her duties, and so long as she acts within the scope of those duties, it would be singular indeed that she should forfeit her rights as an individual, merely by reason of her having properly complied with the requirements of the law in her fiduciary character.

Such sales, when made by commissioners, are judicial in their character, and, like sales under execution, leave the widow's right to dower unaffected. The purchaser is supposed to examine the record, and to know what he is buying, and to purchase with a knowledge that the dower is yet an incumbrance upon the land. The maxim, "*caveat emptor*," applies; and if the purchaser blindly bids off the land without inquiring whether the widow has relinquished her dower, or consented to a sale of it, electing to take a share of the proceeds in lieu thereof, it is his folly, and he has no one to blame but himself.—Perkins' Ex'rs v. Winter's Heirs, 7 Ala. 855; Worthington v. McRoberts, 9 *ib.* 297. As to title sold, see Clay's Dig., p. 195-6, § 18.

We are of opinion, therefore, that there was no fraud on the part of Mrs. Owen, in failing to announce at the sale that the land was sold subject to her dower; neither is she estopped from setting up her claim to dower by reason of her silence. Whether, if she had sold the land in her fiduciary character, and executed a conveyance, her dower interest would not have passed thereby, is a question which may admit of discussion, and one which it is not our purpose now to decide, as the record before us does not involve it. The case of Shurtz v. Thomas, 8 Penn. State R. 359, goes greatly beyond this. There the conveyance, made under order of court, was by the widow—the administratrix—and purported to convey the estate of her husband and of her, the administratrix, since his decease:—*Held*, that the conveyance was to be referred to her office, and left her dower unaffected.

2. It is insisted for the defendant, that the statute contemplates the claim for dower shall be made in one application for all the lands which lie in the county, and that the widow cannot make a separate application for each tract. It may be, when the application is made under the statute to the Probate Court, that she would be confined to a single application; but the statute was not intended to deprive the Chancery Court of its jurisdiction, as it is not taken away in terms. The rule is, that although the statute may confer jurisdiction upon another court, over subjects-matter of which the Chancery Court had jurisdiction, the jurisdiction of the latter court remains unimpaired, unless by the language of the statute they are forbidden to proceed in such cases. We entertain no doubt of the right of the complainant to proceed in equity, in the case before us; the premises out of which dower is claimed being a city lot, on which there are improvements, and in which equitable dower (instead of one-third of the lands by metes and bounds) must usually be assigned.

3. It appears that the statute of limitations was passed on the 7th day of February, 1843, and this bill was filed on the 7th February, 1853. In our opinion, the ten years was not completed when the bill was filed. Whatever may be the English doctrine upon this subject, it is the practice of our court to include one day and exclude the other, except when the statute requires so many entire days to intervene,—in

which case, both are excluded.—See Garner & Neville v. Johnson, 22 Ala. 494-501. Such also appears to be the rule in New York.—Fairbanks v. Wood, 17 Wend. 329-331; Snyder v. Warren, 2 Cow. 518-521; *Ex parte* Dean, *ib.* 605-6, note *a;* see, also, Angell on Lim. 45 to 50, where the authorities are cited.

The decree of the chancellor is erroneous. Let it be reversed, and the cause remanded.

LETONDAL *vs.* HUGUENIN.

1. Under the Code (§ 2570), in a suit commenced by attachment, a judgment by default cannot be taken on the first day of the term to which the writ is returnable; but if the suit is brought in either the Circuit or City Court of Mobile, and the attachment is levied more than twenty days before its return, judgment by default may be taken on the first day of the term under the provisions of the act of February 17, 1854, (Pamphlet Acts 1853-4, p. 91, § 6.)
2. And if the attachment is not sued out against a non-resident, but is levied on the defendant's goods and chattels, and no garnishee is summoned, there is no law requiring any notice to be given.
3. A complaint in the form prescribed by the Code (p. 551), "on promissory note, by payee against maker", is sufficient to support a judgment by default; and its legal effect is the same as if it contained an averment, in express terms, that the note was payable to the plaintiff.
4. When the judgment entry recites, that "the plaintiff came by attorney, and the defendant having failed to file his plea within the time prescribed by law, it is considered by the court, that the plaintiff have and recover of the defendant", &c., "the damages due by the two promissory notes declared on", it will be presumed on error, that the complaint shown by the record (although the day on which it was filed is not endorsed on it, as required by section 2247 of the Code) was filed before the rendition of the judgment by default.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS suit (A. C. Huguenin vs. Jules Letondal) was commenced by original attachment, sued out on the ground that the defendant had money, property, or effects, liable to the

satisfaction of plaintiff's debt, which he fraudulently withheld. The attachment was issued by the clerk of the Circuit Court, on the 23d February, 1854, and was returnable (*not* "to the next term of the Circuit Court," &c., but) "at the court-house, on the third Monday after the fourth Monday in March next"; and it was levied, on the 24th February, on a gold watch and breastpin.

The complaint, which was endorsed "Filed in office", but no date or signature affixed to the endorsement, was in these words:—

"A. C. Huguenin *vs.* Jules Letondal. } The State of Alabama, Mobile County. Circuit Court, Spring term, 1854.

"The plaintiff claims of the defendant twenty-one dollars, due by promissory note, made by him November 24, 1853, at sixty days; also, the sum of one hundred and twenty-five dollars, due by promissory note made by him November 24, 1853, at ninety days, with interest thereon; both of which said promissory notes are now due."

The judgment entry, which is next set out, is as follows:—

"This day came the plaintiff by his attorney; and the defendant having failed to file his plea herein within the time prescribed by law and the rules of this court, it is considered by the court, that the plaintiff have and recover of the defendant the sum of one hundred and forty-seven 65-100 dollars, the damages due by the two promissory notes declared on, together with his costs in this behalf expended."

On this judgment the following errors are assigned:—

"1. The court erred in rendering judgment for the plaintiff at the return term of the writ of attachment, against the provisions of the Code in that respect, and when there was no authority by law for rendering the same.

"2. In rendering judgment by default for the plaintiff, when it did not appear that the complaint had been filed within the three first days of the return term of the attachment, as required by the Code, nor that the defendant was in default.

"3. In rendering judgment for the plaintiff, when it did not appear that the time for pleading to the complaint had elapsed after the filing thereof; as the time of filing the same

is not shown, as required by the Code, nor whether the complaint was filed before or after the judgment.

"4. In rendering judgment for the plaintiff on the complaint; the same not showing sufficiently a cause of action in favor of the plaintiff in the suit, and no evidence being produced to the court.

"5. Because it does not appear that the complaint was filed before the judgment was rendered.

"6. Because the complaint was not sufficient, nor does it show sufficiently that the debts were due when the attachment was issued, nor that the notes were payable to plaintiff, nor that he held them; nor are they filed, to show that a debt is due, nor how much."

GEO. N. STEWART, for the appellant:

1. The Code provides that in attachments judgment shall not be rendered at the first term, unless the defendant appear and plead.—Code, § 2570. Here the judgment was rendered at the first term by default.

2. The Code requires the complaint to be filed within the three first days of the return term of the attachment.—Code, § 2570. It also requires that the true date of the filing of all pleadings shall be endorsed on them.—Code, § 2247. Here it does not appear that the complaint was filed as required by the Code, nor when filed, nor if filed three days before the trial, nor if filed even at the time of the trial; so that it does not appear that the time allowed for filing a plea had elapsed which the law allowed to the defendant after the complaint was filed; but the very contrary appears. The complaint could not properly be filed before the very day when judgment was rendered, and no time was allowed even to plead.—See Code, §§ 2257, 2258.

3. It was not competent for the clerk, or the court, to assess the damages; nor could judgment be rendered for the plaintiff without the proof of the debt, by the production of the notes sued on, as the complaint does not contain all the averments necessary for the establishment of a cause of action. It does not appear to whom the notes were payable, nor who held them when suit was brought, nor at the time of the trial, nor that they were produced, nor are they filed. The debt,

therefore, is not established, either by the allegations confessed, or by proof produced.

Does a judgment by default, on a complaint under the Code, authorize a judgment without proof? Is judgment given on the allegations of the complaint, or on the proof produced at the trial? In the forms prescribed by the Code, the facts necessary to entitle a party to a judgment are not required to be stated, as in a declaration. The complaint stands like the endorsement on a writ, not a technical specification of the facts which the law requires to demonstrate the liability, but as a mere notice to the defendant of what the plaintiff intends to rely on; it may contain, too, much that is conclusion of law, not averment of facts. The default merely admits that the plaintiff has a cause of action, but not what it may be, nor how much. Suppose the complaint is defective, and no demurrer to it is filed; no objection can then be taken to it, and yet it will show no cause of action. Suppose then there is a verdict for the plaintiff; can the judgment be arrested? But if proof was adduced on the trial of a complete right of action, and no objection was made, and no bill of exceptions taken, the plaintiff would be entitled to his judgment. The judgment, then, is not given on the record or pleadings, but on the proof.

A. J. Requier, *contra*, contended, 1st, that the complaint was sufficient under the forms prescribed by the Code; 2d, that judgment by default was properly taken on the first day of the term, under the provisions of the act of 17th February, 1854, regulating the practice in the Circuit and City Courts of Mobile; and, 3d, that no notice was necessary, as there was no garnishment.

RICE, J.—If the provisions of the Code *only* governed this case, the judgment by default could not be supported; because on the mere levy of an attachment, it was rendered at the first term after such levy, and on the first day of the term. Code, § 2570; Pruitt v. Clack, 9 Porter's R. 286.

But the provisions of the Code, in this class of cases, are materially modified by the act of 17th February, 1854, whenever such cases are brought in *the Circuit or City Court of Mobile*.—Pamphlet Acts of 1853-4, pp. 91-2.

The attachment in this case was levied more than twenty days before the case was placed on the docket and the judgment by default taken. It therefore stood for trial on the day the judgment was rendered, under the provisions of the 6th section of the act of 1854 above cited, unless some law in existence at the passage of that act required a notice to be given.

If the attachment had been sued out against a non-resident, the then existing law would have required a notice to be given; and in that case, judgment by default could not lawfully have been rendered at the first term ensuing the expiration of twenty days from the levy of the attachment.—Code, § 2510. But the attachment is not here sued out against a non-resident. It was levied on the goods and chattels of the appellant, and no person has been served or summoned as garnishee. In such a case as this, we know of no law which requires a notice to be given. And under the provisions of the act of 1854, *supra*, we hold, that the appellee did not take his judgment by default sooner than he was entitled to it.

The appellant contends, that the complaint, unaided by any proof whatever, is insufficient to authorize or sustain a judgment by default, because it does not show *to whom* the notes sued on were payable. We think otherwise. The complaint is in the form given by the Code for a complaint "*on promissory note, by payee against maker.*" The legal effect of a complaint in this form, is the same as if it contained, in express terms, an averment that the note described in it was payable to the plaintiff in the action; and under this form of complaint, a note not payable to the plaintiff would be inadmissible.

Under the recitals contained in the judgment entry, we feel bound to presume, that the complaint which is shown in the record was filed before the judgment by default was rendered. There is nothing contained in this record, which prevents us from applying to it the maxim, "*Omnia præsumuntur rite esse acta.*"

We are satisfied there is no error in the record. Judgment affirmed.

HAMLET *vs.* JOHNSON.

1. Where one of several residuary legatees, who take in common, dies before the testator, his legacy, which lapses by his death, does not survive to his co-legatees, but descends to the testator's next of kin under the statute of distribution, and no interest in it passes to one who takes a life estate by implication in the residuum.
2. On petition to the probate court for the distribution of slaves not disposed of by will, if the number of distributees exceeds the number of slaves to be divided, the court may order a sale in the first instance, without the appointment and report of commissioners.

APPEAL from the Court of Probate of Madison.

IN the matter of the petition of Daniel Johnson, as trustee of Sarah Johnson, against Mrs. Phebe Hamlet, as executrix of Robert Hamlet, deceased, who was the father of said Sarah, for distribution of a lapsed legacy.

The only clauses of the testator's will which have any bearing on the questions presented in the case, are the third and the twelfth, which are as follows:

"3. I give to my wife, Phebe Hamlet, and her lawful executors, in special trust and confidence, and for the uses, intents, and purposes hereinafter mentioned, that is to say, for the support and maintenance of my son Richard G. Hamlet, for and during his single life; and should my son Richard G. Hamlet marry, then, in that event, he shall take the slaves hereinafter mentioned into his possession; and the property given in trust to my wife, Phebe Hamlet, trustee, shall be as follows, viz., one negro man named Dick, and one negro man named Ben."

"12. I also give to my wife, Phebe Hamlet, all my stock of every description, farming utensils, house and kitchen furniture, wagons, barouche, &c., for and during her natural life, or during her widowhood; and at the death or marriage of my wife, it is my will that the whole of my property then remaining, both real and personal, and not specifically willed away to any of my children, shall be sold, and the proceeds thereof shall be equally divided amongst all my children."

This will was admitted to probate on the 5th August, 1847,

and the widow qualified as executrix, but the record nowhere shows the date of her appointment. Richard G. Hamlet, the legatee named in the third clause of the will, died before the testator, but subsequent to the execution of the will, and was never married.

The record does not show when the petition in this case was filed, but the citation to the widow was issued on the 20th January, 1853. The petition, in addition to the facts above stated, alleges, "that the testator left ample means for the payment of all his debts, without the sale of the said slaves Dick and Ben, and that they are and ever have been subject to division amongst the heirs of said Robert Hamlet, deceased"; also, "that the said testator left a widow and six surviving children, of whom the said Sarah Johnson is one, and that she is entitled to a distributive share of the said lapsed legacy." The prayer of the petition is, "that the said executrix may be required to show cause why the said lapsed legacy shall not be distributed according to law, and that all such other and further proceedings may be had as are requisite to accomplish the object of this petition."

On the final hearing of the petition, as the bill of exceptions states, "it was shown on the part of the defence, that the testator's will specifically mentioned all the property possessed by him at his death, except four negroes, viz., Ellen, twelve years of age, Lucy Neal, and Caroline, each one year old, and Charley, three months old, and the then growing crop, besides a few other inconsiderable articles; that as such executrix, she (Mrs. Phebe Hamlet) had, at the September term, 1849, filed her accounts and vouchers for a final settlement, which settlement was made, in due form of law, at the October term thereafter; that everything not specifically disposed of in said will, except said four negroes and the two in controversy, had been sold in due course of administration; that the proceeds of said sale proved insufficient to pay the indebtedness of said estate; that on said settlement in 1849, a balance was declared in her favor, as due from said estate, of the sum of $816 30; that she was still a widow, and that the said executrix had held said negroes since the death of the said testator, claiming to hold them during her life or widowhood. The said defendant did not answer or plead to said

petition in form, but, without objection from petitioner, insisted on the matters of law arising on said facts, as barring the petitioner's right to recover. The court, however, thought and ruled, that the petitioner had a right to recover, and decreed accordingly; to which the defendant excepted."

The decree of the court recites, that it appeared to the satisfaction of the court that the slaves described in said lapsed legacy were subject to distribution amongst the heirs-at-law of said testator, and that they could not be fairly divided without a sale thereof; and the executrix is accordingly ordered to sell them, on a credit of six months.

The executrix, who is now appellant, assigns for error—

"1. The court erred in granting the prayer of the petition.

"2. The court erred in the decree rendered.

"3. The court erred in proceeding to a final decree without all interested in the estate having been brought before it.

"4. The court erred as shown in the bill of exceptions."

ROBINSON & JONES, for the appellant:

1. Richard G. Hamlet having died in the lifetime of the testator, the bequest to him, embracing the slaves in controversy, lapsed. The first question, then, is, Did these slaves go to the distributees, unaffected by the will, or did they pass under the general residuary clause? A lapsed or void legacy of personal property passes under the residuary clause.—Roberson v. Roberson, 21 Ala. 275; 4 Barb. S. C. Rep. 82; Ward on Legacies, p. 30. So, also, all that turns out to be not well bequeathed passes under the residuary clause.—21 Ala. 275; Leake v. Robinson, 2 Mer. 392; Jackson v. Kelly, 2 Ves. 285; Brown v. Higgs, 4 *ib.* 708; Roberts v. Cooke, 16 *ib.* 451. And it makes no difference, that the residuary bequest is of "the rest and residue not before particularly and specifically disposed of."—Roberts v. Cooke, *supra*; Brown v. Higgs, *supra*; Ward on Leg., p. 31-2; 2 Wms. Ex. 1251.

2. These slaves falling into the residuum, the next question is, whether they belong to the widow for life under the twelfth clause, or pass to the executrix under the latter branch of that clause. The decision of this question either way is fatal to the claims of the petitioner. The appellant claims, 1st, that the will gives her a life estate in these negroes, and all

others not disposed of by the will, by implication; and insists, 2dly, that if this is not so, she is entitled to them as executrix until her death or marriage, at which time they must be sold, and the proceeds of sale divided among the children. This latter view is strengthened by the sixth clause, in which the testator provides, that if a negro given to his grand-son Richard should die before the legatee arrives at full age, the executors shall buy him another; thus recognizing the idea that they were to have funds in their hands as such.—Chighizola v. LeBaron, 21 Ala. 407.

3. The evidence shows that the widow had had possession of these negroes for more than six years, claiming to hold them as her own during the term of her natural life. Her title, therefore, for that period, became good against the world under the statute of limitations.

4. But if the petitioner be entitled to a distributive share of the property, the court erred in ordering a sale of it. There were, according to the petition, six negroes and six distributees; and hence the presumption is that they could be divided. But if the truth was that they could not be divided, there was but one way in which that fact could be made known to the court: commissioners should have been appointed to make a division, and upon their report that a division could not be made, which fact might have been contested by any of the other children, the court should have made an order of sale; but the court could not order a sale on the application of one of the distributees, without the others being made parties, or without their having an opportunity to contest the same.—McCurry v. Hooper, 12 Ala. 826; Murray & Durand v. Tardy, 19 *ib.* 710.

BRICKELL & CABANISS, *contra.*

CHILTON, C. J.—By the 12th item of this will, the whole of the testator's property remaining after the death or marriage of his wife, and not specifically willed away to any of his children, is required to be sold by his executors, and the proceeds to be equally divided among all the children of the testator. The bequest to Richard of the two slaves lapsed by his death before the will took effect; and the question is,

whether these slaves fall into the residuum created by the 12th item, or whether the testator is to be regarded as having died intestate as to them.

It seems to be well settled, and we have so expressly declared the law to be, that where one of several residuary legatees dies before the testator, and the residuary estate given to them is to be held by them in common, his portion does not survive to his co-legatees, but goes to the testator's next of kin according to the statute of distribution.—See Bendall's Distributees v. Bendall's Adm'r, 24 Ala. 309, and authorities there cited. The case before us falls within this category. The residuary legatees, who are the testator's children, hold in common. With us there can be no joint estate technically, for the right of survivorship is taken away by our statute, existing long before the will was made; and the deceased child, Richard, is one of the persons intended by the testator, when he prepared his will, to take as one of the residuary legatees. According, then, to the settled rule, his interest, having lapsed by his death before the death of the testator, remains to be distributed as in case of intestacy.

We think it is very clear, that in order to give the widow a life estate by implication, or an estate during her widowhood, the will must create an interest in the residuary legatees in the remainder. In other words, if the children, who are to take the proceeds of the sale of all the property not specifically bequeathed, to be derived from a sale of such property required by the will to be made upon the death or marriage of the widow, can take no interest in these slaves bequeathed to Richard, then there is no life estate, or estate *pendente viduitate*, in Mrs. Hamlet. For the particular estate, if it results at all, attaches to or grows out of the bequest of the property in remainder to the children; and if the principal estate is not created by the will, no implication raising the particular or immediate interest can be indulged—the principal failing, that which is but the incident must fail.

2. The only remaining question is, whether the court proceeded regularly in ordering a sale of the slaves for the purpose of making distribution.

It is said, the distribution is not to be made until the death or marriage of the widow, and that the sale and distribution

of the proceeds of these slaves are premature. This objection, however, presupposes that the slaves, so sold, pass under the will, and are therefore to be governed by its provisions; whereas, we have shown, that as to this property, the testator must be regarded as dying intestate, and consequently the court must dispose of them as though no will had been made.

It does not appear when the petition in this case was filed. The citation to the widow issued the 20th January, 1853. Assuming that the petition was filed on that day, the possession of the widow must be considered as commencing from the time the will was admitted to probate, namely, the 5th of August, 1847; for, until that time, there was no one who could consent to the legacy of the slaves in question, conceding that they passed to the widow under the 12th item of the will. Claiming, as she does, under the will, her rightful possession could only accrue upon proof of the will and qualifying as executrix; so that her possession could not have given her a title before the petition was filed, (six years not having intervened between the probate and the application for distribution,) even conceding that she could set up an adverse claim to the rightful distributees, which we do not decide.

It is clear that an equal distribution could not have been made of these slaves without a sale. There are six distributees (children) and a widow, among whom the proceeds are to be divided, and but six slaves, including those remaining with the executrix and not mentioned in the petition. The Probate Court might well, therefore, have ordered the sale, as six negroes could not be divided into seven shares. There was no need that this fact should have been certified to him by commissioners appointed to make the distribution.

Let the decree be affirmed.

ECKLES & BROWN *vs.* CARTER.

1. The consideration clause in a bill of sale of a slave, though under seal, is open to explanation by parol evidence; as, where a consideration in money is expressed, it may be shown to have been another slave.
2. On an exchange of slaves between plaintiff and defendant, the parties reciprocally executed bills of sale, under seal, containing warranties of soundness; and plaintiff afterwards brought covenant to recover damages for defendant's breach of warranty: *Held*, that the defendant might recoup the damages which he had sustained by plaintiff's breach of warranty.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN GILL SHORTER.

ACTION OF COVENANT by Eckles & Brown against Hiram Carter, to recover damages for defendant's breach of warranty of the soundness of a slave. The bill of sale was under seal, and the consideration was expressed in it to be eight hundred and fifty dollars. The court below allowed the defendant, against plaintiffs' objection, to show by parol evidence that the consideration, though expressed in the bill of sale to be a sum of money, was another slave, which he had received in exchange from the plaintiffs,—that on making the exchange, mutual bills of sale under seal, containing covenants of warranty of soundness, were executed by himself and the plaintiffs, and that he had sustained damage by reason of the unsoundness of the slave which he had received on the exchange; and charged the jury, in effect, that he was entitled to recoup these damages in this suit. These rulings of the court, to which the plaintiffs duly excepted, are now assigned for error.

NAT. HARRIS, for the appellants:

1. Parol evidence was not admissible to show that the consideration for the slave conveyed by the appellants to the appellee was not, as expressed in the sealed bill of sale, eight hundred and fifty dollars, but another slave.—Toulmin v. Austin, 5 Stew. & Port. 420; Mead v. Steger, 5 Port. 498 (504); Hair v. La Brouse, 10 Ala. 548. In the case of Pettus v. Roberts, 6 Ala. 813, which is cited for the appellee, the re-

ceipt was not under seal; and the case of Saunders v. Hendrix, 5 Ala. 226, does not decide that a party can show a different consideration from that expressed in the deed. The result of the cases decided in this court, thus far, is, that when a receipt not under seal is given for money, it is permissible to show a different consideration than that expressed in it; but if the conveyance is by deed, it is not permissible to show a different consideration than that expressed.

2. The defendant was not entitled to recoup or deduct the damages which he had sustained, by reason of the unsoundness of the slave conveyed to him by the plaintiffs, from the damages which they had sustained by reason of the unsoundness of the slave which he had conveyed to them. The claim for damages did not originate in the same contract, and therefore the right to recoup did not exist.—Hatchett & Bro. v. Gibson, 13 Ala. 594; Seymour v. Davis, 2 Sandf. S. C. R. 240; Sedgwick on Damages, (2d ed.) p. 240.

JAMES L. PUGH, *contra*:

1. Parol evidence was admissible, notwithstanding the bill of sale was under seal, to show the true consideration.—Saunders v. Hendrix, 5 Ala. 224; Pettus v. Roberts, 6 *ib.* 811; McRea v. Purmort, 16 Wend. 460.

2. The defendant had a right to recoup his damages. The contract was entire, the covenants were dependent, and the damages sprung out of the same contract.—Greene v. Linton, 7 Port. 133; Hill v. Bishop, 2 Ala. 320; Hatchett v. Gibson, 13 *ib.* 587; Batterman v. Pierce, 3 Hill's (N. Y.) R. 171; Ives & McCarty v. Van Epps & Shattuck, 22 Wend. 155.

GOLDTHWAITE, J.—The action was on a covenant of warranty of soundness, in a sealed bill of sale of a slave. The consideration expressed in the instrument was eight hundred and fifty dollars; and parol evidence was admitted to show, that the real consideration was not money, but another slave. The action of the court in this respect is the ground of the first assignment of error.

In England it is settled, that the recital of the consideration money in a deed, in the absence of fraud, is conclusive upon the parties upon all questions arising out of the instru-

ment itself.—Shelley v. Wright, Willes 9; Cossens v. Cossens, *ib.* 25; Rountree v. Jacob, 2 Taunt. 141; Lampon v. Corke, 5 B. & Ald. 606; Baker v. Dewey, 1 B. & C. 704; Hill v. Manchester Water Works, 2 B. & Ad. 544; Lainson v. Tremere, 1 Ad. & El. 792; Bowman v. Taylor, 2 *ib.* 278. In the American courts, however, a different (and, as we think, a sounder) doctrine prevails; and in every State in which the question has been made, with the exception of North Carolina (Graves v. Carter, 2 Hawks, 576; Speirs v. Clay, 4 *ib.* 22), it has been held, after some struggles and much discussion, that the consideration clause in a deed is not conclusive.—Schilinger v. McCann, 6 Greenl. 364; Tyler v. Carleton, 7 *ib.* 175; Emmons v. Littlefield, 1 Shep. 233; Burbank v. Gould, 3 *ib.* 119; Morse v. Shattuck, 4 N. H. 229; Pritchard v. Brown, *ib.* 397; Wilkinson v. Scott, 17 Mass. 249; Clapp v. Tirrell, 20 Pick. 247; Belden v. Seymour, 8 Conn. 304; Shephard v. Little, 14 John. 210; McRea v. Purmort, 16 Wend. 460; Weigley v. Weir, 7 S. & R. 311; Jack v. Dougherty, 3 Watts 151; Higdon v. Thomas, 1 Har. & Gill 139; Lingan v. Henderson, 1 Bland's Ch. 236-249; Duval v. Bibb, 4 Hen. & M. 113; Harvey v. Alexander, 1 Ran. 219; Eppes v. Randolph, 2 Call 103; Garrett v. Stuart, 1 McCord 514; 2 Hill's S. C. 404; Gully v. Grubbs, 1 J. J. Mar. 389; Hutchinson v. Sinclair, 7 Mon. 291-293; Steele v. Worthington, 2 Hamm. 182.

The general course of reasoning of the cases to which we have referred, is, that the amount, or character of the consideration, does not, when the deed itself is not attacked, affect its operation as to the estate conveyed, and is therefore not properly to be regarded as of the essence of the instrument, but is rather to be assimilated to its date, or such other recitals as have no bearing upon its effect; to which the attention of the party is not supposed to be particularly directed, and to which, therefore, the principle of estoppels, in its strictness, does not apply. All the cases concede, that the clause has the effect of preventing a resulting trust in the grantor, and that so far as it was intended by the parties to pass a right, they are concluded by it; and, also, that it is *prima facie* evidence of the consideration. In some of the cases to which we have referred, the general doctrine is established, with the qualification, that the explanation must be confined

to the same species of consideration expressed in the deed; and in Brooks v. Maltbie, 4 S. & P. 96, it was held, that a deed, which upon its face purported to be a mortgage, and to have been given to secure a note, could not be shown to have been received in extinguishment of the debt. So, in Toulmin v. Austin, 5 S. & P. 420, it is said by Thornton, J., that extrinsic evidence is admissible to establish the consideration, provided it was not incompatible with the consideration expressed in the deed itself; and there is also a *dictum* of Collier, C. J., to the same effect, in Mead v. Steger, 5 Port. 507. In Saunders v. Hendrix, 5 Ala. 224, Ormond, J., says, that the acknowledgment in a deed that the consideration money has been received, is a mere receipt, and as much open to explanation as if endorsed on the back of the deed; and in Murphy v. The Br. Bank at Mobile, 16 Ala. 90, where the question arose on the trial of the right of property between the claimant and the grantee, it was held, that it was inadmissible to change the character of the deed by proving the consideration to be valuable instead of voluntary, as expressed in the deed.

Referring the decision in the case of Brown v. Maltbie to the admitted principle, that the clause is not to be inquired into for the purpose of changing the character of the instrument, and adopting the general doctrine of the American courts, that the consideration is not conclusive, the question is, whether, where the deed expresses a moneyed consideration of value, any other valuable consideration than money can be shown. On this question, the embarrassment which has been introduced into the cases arises, as we think, principally, from the want of precision and accuracy in the language of judges and text-writers. Mr. Phillips, for instance, in his work on Evidence, (3d American ed., vol. 2, p. 369,) speaking of the consideration of a deed being thrown open to inquiry by fraud in its execution, says, "in that case the party will not be allowed to prove any *other* consideration"; and he refers to Clarkson v. Hanway, 2 P. Wms. 203, and Watts v. Grove, 2 Sch. & Lef. But, on looking into these cases, it will be found, that in the first, the consideration attacked purported to be valuable, and the one offered to support the deed was a good consideration merely; and in the other case,

it was entirely inconsistent with that expressed in the instrument. So, in Bridgman v. Green, 2 Ves. 628; and (as is said by the authors to the notes to the work we have last referred to) we have not been able to find any English case, which, when the deed has been impeached, "has gone beyond the point of disallowing proof to show a consideration of a different species, so as thereby to change the nature of the deed." Cow. & Hill's Notes, part 2, 614. We can see good reason, where the instrument is attacked for fraud, for not allowing its character to be changed by evidence of an entirely different consideration; but where the deed is not impeached, we are unable to perceive any reason why any consideration, which is sufficient to support the deed, may not be shown. In such a case, we see no middle ground to occupy, and must either hold that the clause is conclusive, operating by way of estoppel, or must throw it entirely open to explanation. As is said in one of the cases to which we have referred, if it be allowable to prove that one thousand dollars was given, instead of five hundred, upon what principle is it that any other valuable consideration may not be proved as well as money? The reason and good sense of the thing are the same in each case. If the consideration is open at all, it should, we think, be treated as a mere receipt, and be governed by the same analogies, in every case where the deed is not attacked. This we understand to be the New York doctrine, as laid down in McRea v. Purmort, *supra;* and it is inferable from Morse v. Shattuck, and Belden v. Seymour, *supra.* It is, as we think, based upon sound principle, and meets the justice of the cases to which it is applicable.

Upon the other question there is no difficulty. The exchange of the slaves—the one in consideration of the other—was one transaction; and that being the case, if the covenant of soundness in relation to the slave received by Carter was broken, he had the right to recoup the damages arising from the breach, against those which the other party complained of.—Hill v. Bishop, 2 Ala. 320; Hatchett v. Gibson, 13 Ala. 587; Batterman v. Pierce, 3 Hill (N. Y.) 171.

Judgment affirmed.

KEENAN *vs.* COMM'RS' COURT OF DALLAS CO.

1. The proceedings of the commissioners' court, in the establishment of a public road, cannot be sustained, when assailed on *certiorari*; unless the record shows that the court had jurisdiction, and that its jurisdiction was exercised in the mode prescribed by the statute.
2. The form of oath prescribed for the viewers of the road (Code, § 1134) must be fully set out, and precisely pursued: a recital, in their return, that they were "duly sworn before acting," is insufficient.
3. The record must show that the road described in the order of the court was viewed and marked out by the jury, "to the greatest advantage to the public, and with as little prejudice to individuals as possible, and without partiality or favor:" where the order of the court directs the jury "to view and mark out the best route for the said road," and they report that, "being duly sworn before acting," they "performed the duty assigned them in the order to the best of their ability, without partiality or favor," this is not a sufficient compliance with the requisitions of the statute.

APPEAL from the Circuit Court of Dallas.
Tried before the Hon. NAT. COOK.

IN the matter of William P. Molett's application for the establishment of a public road, which was contested by the appellant, M. J. Keenan. The order of the Commissioners' Court, establishing the road, is as follows: "It is ordered and adjudged that the road be established according to the aforesaid application and petition; and thereupon the court selected and appointed seven disinterested house-holders of the county of Dallas," (whose names are here set out,) "to view and mark out the best route for the said road; and that an order issue to the said viewers, according to the statute in such cases made and provided, and that said viewers, after viewing and marking out the same, return the same to this court on or before the next regular term." The report of the jury was in these words: "In pursuance of an order of the Hon. Court of County Commissioners," &c., (setting out at length the order above copied,) "we, the undersigned, being duly sworn before acting, do report, that we have performed the duty above assigned us, to the best of our ability, without partiality or favor."

After the report had been accepted by the court, the ap-

pellant removed the proceedings, by *certiorari*, into the Circuit Court, and there assigned errors on the record. The Circuit Court affirmed the proceedings, and rendered judgment for the costs against the contestant; and its judgment is now assigned for error. Several exceptions were saved to other rulings of the court, which are embodied in a bill of exceptions; but they are not material to an understanding of the case as here presented.

GEO. W. GAYLE, for the appellant.
WM. M. MURPHY, *contra*.

RICE, J.—Summary proceedings in the Court of County Commissioners, under the Code, to take away a man's land against his will, for the purpose of establishing a new public road, cannot be sustained, when assailed *on certiorari*, unless the record of the proceedings shows that the court had jurisdiction, and that the jurisdiction has been exercised *in the mode prescribed by the Code*.—Rex v. Croke, 1 Cowper's Rep. 26; 3 Phillips on Ev. 987; Caskey v. The State, 6 Ala. Rep. 193; Cloud v. Barton, 14 Ala. R. 347.

The mode of proceeding in such cases is prescribed by sections 1132, 1133, 1134 and 1135 of the Code. Section 1134 prescribes the form of the oath the viewers must take before they act. And therefore we must apply to this case the following well established principle, to-wit, that where a particular form of oath is prescribed, by a statute conferring a special authority, like the statute now under consideration, it must be fully set out and precisely pursued: a recital or allegation that the persons for whom the oath was prescribed by the statute, were "duly sworn before acting," is the recital of an *opinion*, or *conclusion*, and not of a *fact*, and is not sufficient.—Rex v. Croke, *supra*; Molett v. Keenan, 22 Ala. R. 484; Caskey v. The State, 6 Ala. R. 193; Leigh v. The Bank, 10 Ala. R. 339; Pl. & Mer. Bank v. The State, 12 Ala. R. 757; Duncan v. Bank, 4 Porter's R. 181.

Conceding that the Court of County Commissioners had jurisdiction in this case, it was essential to the regularity of the proceedings, that the viewers should have viewed and marked out the road described in the order, "*to the greatest*

advantage to the public, and with as little prejudice to individuals as possible, and without partiality or favor;"—and that the record should show that the road had been thus viewed and marked out. The record does not show, in any manner, that the road was viewed and marked out "to the greatest advantage to the public, and with as little prejudice to individuals as possible." It does not appear that the viewers took the oath prescribed by section 1134 of the Code, nor that the duties which that oath would have imposed on them, if they had taken it, have been performed. Their report shows, that being "duly sworn before acting," they performed without partiality or favor the duty assigned them *in the order* for the proposed road; but their report does not show that *of the court*, to-wit, viewed and marked out "*the best route*" they performed the duties which *the prescribed oath* would have imposed upon them, if they had taken it.

Although we might well hold that this proceeding could not be *collaterally* impeached for such irregularity as above pointed out, we cannot sustain it when assailed on *certiorari*, without disregarding the Code and the well settled principles which govern all such summary proceedings, *when the form of proceeding is prescribed by the statute*. The case of Long v. The Comm'rs Court, 18 Ala. R. 482, was decided under a statute which did not prescribe the form of the oath nor of the proceedings. The irregularity above referred to must be regarded as fatal, when presented (as it is here) *on certiorari*.

The judgment of the Circuit Court is reversed, and judgment must be here rendered, quashing the proceedings of the Court of County Commissioners of Dallas county, set forth in the record; and the appellant must recover of the appellee the costs of this court and of the court below.

CARRIERE *vs.* TICKNOR.

1. Defendant, being indebted to plaintiff by open account for goods sold and delivered, gave him a note for a larger amount on a third person, and agreed to take up the difference in goods at cash value as he might want them, and received part of the goods the next day; but plaintiff, discovering a few days afterwards that the maker of the note was insolvent, thereupon tendered back the note, and demanded a rescission of the contract, and then brought suit on the account for goods sold, &c.; to which defendant pleaded payment and set-off: *Held*, that if plaintiff received the note in payment of the account, without any fraud or misrepresentation on the part of defendant to induce him so to take it, then the delivery of the note operated a payment and extinguishment of the account, and plaintiff became bound to defendant for goods at cash value to the amount of the difference between the note and account; but that this liability for goods, coupled with the disaffirmance of the contract on the part of plaintiff, could not be used as a set-off in this suit, so as to entitle defendant to judgment for the difference between the note and account.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

ACTION on an open account for goods sold and delivered, by Antoine Carriere against John Ticknor, amounting to $188 40, with interest thereon from 5th April, 1853; pleas, payment and set-off.

The plaintiff's bill of exceptions shows these facts:—

"It was proved on the trial, that defendant was indebted to plaintiff, on the first day of March, 1853, in the sum of $135 15, and that plaintiff's agent called on him for payment on the 7th March, when defendant proposed to give in payment a note of D. Sands for $335", payable to his own order, at the office of the defendant, "and proposed to take the balance in goods from plaintiff as he (defendant) might want them. There was evidence tending to show that defendant at the time represented the note to be good, and that he refused to endorse it, saying that his endorsement would make it no better; and there was evidence, also, tending to show that he had only stated at the time that plaintiff's agent knew as much about Sands as he did, and that plaintiff's agent took the note supposing it to be good. The defendant's proposition was first made to the clerk of plaintiff's agent, in de-

fendant's office; that clerk took the note, and went to see plaintiff's agent, and in the course of half an hour he returned, and said that he would prefer defendant's endorsing the note, which was declined; and the clerk then accepted the proposition, and received the note in payment of the account. Plaintiff's agent took the note in payment of the account against the defendant, and upon an agreement that defendant should take out in goods, at cash value, as he might want them, the difference between the note and account; and on the next day the defendant sent and got from plaintiff $53 25 worth of goods on account of that difference. On the morning of 10th March, plaintiff's agent ascertained that Sands was insolvent, and had been so at the time he took the note, and for some months previous thereto; that he had suddenly left for California on the 5th March, without saying anything to his creditors, or even to his confidential clerk; and that his store had been shut up by the sheriff on the 9th March, and was then in the sheriff's hands under attachment process. Plaintiff's agent then immediately returned said note to defendant, and left it with him, notifying him that he considered the contract null and void. Defendant refused to have anything more to do with the note, which was left on his desk; and he subsequently sent it to the office of plaintiff's agent, who refused to receive it, and defendant's agent then laid it on a box in plaintiff's agent's store, where one of plaintiff's clerks found it, and took care of it until the trial, when it was produced by him, and placed among the papers in the cause for the benefit of whom it might concern; both plaintiff and defendant refusing to claim it, or to have anything to do with it. It was in evidence, also, that before the 7th March, 1853, all of said Sands' property was mortgaged for more than its value, by mortgages spread upon the records of Mobile county, where his property was situated; that he owed large debts besides, and was largely insolvent prior to the 5th March, 1853. There was evidence, also, tending to show that defendant had frequently before had notes on Sands for collection, which had always been promptly paid at maturity.

"There was no other evidence before the jury; and thereupon the plaintiff asked the court to charge as follows:—

"1. Unless the jury believe from the evidence that the note

of Sands was the property of the defendant at the time this suit was brought, they cannot find defendant entitled to set it off against plaintiff's demand.

"2. If defendant was indebted to plaintiff for goods sold, and gave the note of an insolvent person, and it was received by plaintiff in payment of that indebtedness, and plaintiff ascertained, in a reasonable time afterwards, the insolvency of the maker of the note, and thereupon immediately returned the note to defendant,—then plaintiff is entitled to sue defendant on the original claim for goods sold, if the note is now in defendant's possession, or where he can get it.

"3. If defendant was indebted to plaintiff in the amount claimed, then that indebtedness would not be destroyed by plaintiff's agent's receiving the note of Sands, unless the note was received with the understanding that plaintiff was to look only to the note for payment, and was to take the risk of its being paid.

"4. If the jury believe that there was any material misrepresentation on the part of Ticknor to induce plaintiff, or his agent, to take the note of Sands in payment of the account, then the taking of said note would not prevent plaintiff from suing defendant upon the original claim.

"5. If the jury believe that Sands was insolvent at the time defendant gave said note to plaintiff's agent, then defendant cannot, under any circumstances, claim from plaintiff any judgment against him for a moneyed demand—the outside he could claim would be, that plaintiff's claim was paid.

"6. If the jury believe that the defendant was aware of the insolvency of Sands at the time of his paying said note to plaintiff's agent, and that plaintiff's agent was not aware of said insolvency of Sands at the time, then the fact of plaintiff's having received said note from defendant would constitute no bar to his suing on the original debt.

"7. That the doctrine of set-off only applies, where each party has, at the commencement of the suit, a good cause of action against the other.

"8. That if plaintiff, at the time this suit was commenced, had no subsisting claim against defendant, then defendant could not claim anything against plaintiff by virtue of the doctrine of set-off.

"9. If the jury believe that defendant used any fraudulent misrepresentation, in order to induce plaintiff, or his agent, to take said note, then the taking of said note furnishes no defence to plaintiff's action, and he is entitled to recover notwithstanding the taking of the note.

"The court gave the first, third, fourth, and ninth of these charges, and refused to give the others; and to each refusal the plaintiff excepted. The court, in its main charge, among other things, charged the jury, that although they might believe that Sands was insolvent at the time the note was given by defendant to plaintiff, yet, if plaintiff agreed to receive it in payment of his account, he would be bound by his agreement, and would be debarred from suing on his original cause of action, unless defendant used some fraud, or material misrepresentation, or unless he knew that Sands was insolvent, and concealed that fact from plaintiff, or his agent, to induce him to take the note; and to this charge plaintiff excepted."

The jury returned a verdict for the defendant, for the amount of the difference between the account and note, and thereupon the court rendered judgment accordingly.

The charge given, and the refusals to charge as requested, are now assigned for error.

P. HAMILTON, for the appellant:

1. The receipt by a creditor of a promissory note, or bill of exchange, in discharge of an open account, is not a payment of the debt, unless it is expressly so received: the mere receipt of such security, *ipso facto*, does not work a payment. 12 How. 225; 10 Peters 534; 3 Denio 410; 5 Barb. S. C. R. 398-408; 8 Conn. 472; 10 Ala. 766; 15 *ib.* 393. And even if a receipt be given, acknowledging the note to be in payment of the account, it is not conclusive that the note was taken in extinguishment of the debt.—2 Gill & J. 493. So the mere receipt of a third person's note will not extinguish the original debt, except upon an express understanding to that effect.—7 Term R. 64; 6 *ib.* 52. The risk of payment, and of the maker's solvency, is on the party paying.—1 Stra. 415; 2 *ib.* 1248; 1 Esp. Cas. 3; 15 Mass. 75-80; 6 *ib.* 182-6; 15 N. H. 332; 5 *ib.* 410; 2 Nott & McC. 102; 1 Cow. 383-5; Story on Bills of Exchange, § 225. This is the rule with

respect to bank-notes paid out—the risk of their genuineness, and of their solvency, is on the party paying them.—Story on Bills, *supra;* 11 Wend. 9; 13 *ib.* 101; 4 Verm. 555; 11 *ib.* 516, 576; 6 Hill (N. Y.) 340; 2 Johns. 455. The reason of this rule is the same in each case, and the doctrine rests on sound sense: the creditor contracted to receive value, and received only waste paper. This proposition the court below denied, and put the case solely on the ground of fraud in Ticknor.

2. If the above be true, it is clear, that the ruling of the court on the question of set-off, and the judgment against plaintiff for the nominal surplus of the note, were wrong. Even if plaintiff were bound by taking the note in the manner he did, it could only operate as a payment of his claim. He no longer had a demand against defendant; and without a subsisting demand in favor of the plaintiff, there is no room for the assertion of a set-off.—3 Har. (15 Penn.) R. 225. If the plea of payment is true, the plea of set-off cannot be maintained. Defendant's remedy, if he had any, lies in an independent suit against plaintiff. It was not a money demand, but a claim for goods to be delivered, and was not proper for a set-off.—Hutchinson v. Reid, 3 Camp. 329; 10 N. H. 445; Babington on Set-off, (6 Law Lib.) m. p. 9.

R. H. Smith, *contra.* [No brief on file.]

CHILTON, C. J.—If no fraud, or misrepresentation of any kind, was used by the defendant, or his agents, to induce the plaintiff to take the note on Sands for $335, *in payment of the account for goods, &c., sold,* and the plaintiff *did in fact receive the note in payment,*—the defendant refusing to endorse the same, and the plaintiff agreeing to allow the defendant "to take out, in goods at cash value, as he might want them, the difference between the amount of the account and the amount of the note,"—then it is clear, by the terms of the contract, the account was paid by delivering the note, and the plaintiff became bound to the defendant to allow him to take up goods, at cash value, to the amount of the difference between the note and account. But we are unable to perceive how this undertaking, to pay the difference in goods at cash

value, as the defendant might want them, can be made a set-off in this cause. The proof did not *tend* to establish a set-off, but a *payment*. The account was paid, and extinguished, and there was no legal liability to pay the difference in money. The contract was valid, or it was not. If valid, it amounted to a payment of the account sued on, and a liability was created to pay the remainder in goods, at cash value, as defendant might want them, a portion of which goods the defendant has already received; if invalid, the plaintiff was entitled to his suit upon the account, as though the note on Sands had never been transferred to him.

In our opinion, the disaffirmance of the contract on the part of the plaintiff, by bringing his suit after tendering back the note, did not so affect the nature of the contract, as to change a payment into a set-off, and entitle the defendant to recover for the amount of the note as upon a moneyed demand. This was, in substance, the effect of the fifth charge, which denied the right of the defendant, under the proof in this case, to recover over against the plaintiff on account of the transfer of the note. The charge must be referred to the proof, all of which is set out in the bill of exceptions; and as it did not *tend* to prove a set-off, the fifth charge was proper. The utmost the defendant can claim is, a verdict and judgment on his plea of payment.

For the error in refusing the fifth charge, thereby conceding there might be a set-off under the proof,—which opinion was carried out by the court in rendering the judgment over against the plaintiff,—the said judgment must be reversed, and the cause remanded.

JOHNSON *vs.* BOYLES ET AL.

1. When a deed purports on its face to be made, not only in consideration of natural love and affection, but also "for divers other good considerations" which are not specified, parol evidence is admissible to show what the other considerations were.

2. The statute of frauds (Clay's Digest, p. 255, § 2) in relation to conveyances of personal property "upon consideration not deemed valuable in law", does not apply to a deed which purports to be made in consideration of natural love and affection "and for divers other good considerations", and which is shown by parol to have been made upon valuable consideration.
3. The written declarations of the grantor, while in possession of the slaves conveyed, to the effect that he held for the grantee, are admissible evidence as part of the *res gestæ* explanatory of his possession.
4. An incorrect abstract charge is not a reversible error, when the record shows clearly that it could not have prejudiced the appellant.
5. A purchaser without notice from a person in possession of a slave, which does not belong to him, does not necessarily obtain a good title; and therefore a charge which, in effect, asserts that he does, is properly refused.

APPEAL from the Circuit Court of Monroe.

Tried before the Hon. C. W. RAPIER.

TROVER by Martha L. Boyles, Solomon Boyles, and Thomas J. Boyles, infants suing by their next friend, against Lewis Johnson, for the conversion of two slaves named Eliza and Mary; plea, not guilty, in short by consent.

On the trial the plaintiffs offered in evidence a deed, executed by Palmer D. Abney, dated the 10th August, 1847, and attested by two witnesses, of which the following is a copy: "State of Alabama, } Know all men by these presents, that Monroe County. } I, Palmer D. Abney, of the county of Butler and State of Alabama, for and in consideration of the natural love and affection which I bear my sister, Elizabeth L. Boyles, wife of Joel Boyles, of the county of Monroe and State aforesaid, and for divers other good considerations, do give, grant, and sell unto the said Elizabeth L. Boyles a female slave named Eliza, and her increase, for her sole use and benefit, and free from the debts, management, or control of the said Joel Boyles. Also, the said Palmer D. Abney doth covenant and agree with the said Elizabeth L. Boyles, to act as trustee of said negro woman, in trust for the sole use and benefit of the said Elizabeth; upon the further trust, that with the assent of the said Elizabeth, I shall have full power to sell or exchange said slave, which slave, or other property, shall be subject to the provisions of this deed; upon the further trust, that, upon the death of said Elizabeth, said slave and her increase, or the property received in exchange, then to belong to the heirs of her body; upon the further trust,

that, upon my death, said Elizabeth L. Boyles shall have full power to appoint another trustee in my stead and place, in writing. Given under my hand and seal," &c.

On this deed there was a written endorsement by said Joel Boyles, in these words: "This is to certify that I have no objections to the provisions of the within deed of trust.—August 10, 1847"; also, the certificate of the clerk of the County Court of Monroe county, dated August 11, 1847, that the said Abney on that day acknowledged before him "that he signed and sealed the foregoing deed of trust to Elizabeth L. Boyles, on the day and year, and for the purposes therein mentioned"; and a written memorandum by the clerk, that the deed was left in his office on that day for registration, and was duly recorded.

"The defendant admitted this to be a good deed between the parties to it, but objected to its being read to the jury as notice to the defendant. It was read to the jury, but the question of notice was reserved to a further stage of the case. The plaintiffs, for the purpose of showing a consideration for the deed, offered testimony tending to show that, early in 1847, said Joel Boyles, the husband of said Elizabeth, owning two young negroes, sent them to said Palmer D. Abney for the purpose of trading or exchanging them for a negro woman for his wife, and which would be of assistance to her; that Abney effected this, and exchanged them for the said woman Eliza; that in the spring of 1847, and in the month of June or July, he sent said Eliza to the house of said Boyles, in Monroe county, where he and his wife resided; that in August, 1847, said Abney executed said deed, and the woman remained in the family of said Boyles until about frost of that year, when she ran away to said Abney in Butler county. The defendant objected to the introduction of that part of the above testimony which relates to the exchanging of the negroes, admitting that which relates to the possession of Eliza and the making of said deed; but the objection was overruled, and the whole testimony admitted, and to this the defendant excepted.

"It was further in proof, that Abney subsequently removed to Monroe county, and that he retained the possession and control of Eliza from the period above indicated up to the

date of his sale of her to the defendant—on the 16th January, 1851. Plaintiffs proved, also, by Joel Boyles, that Abney, while in possession of Eliza, always admitted to him that he held her for Mrs. Boyles, and spoke of her to him as Mrs. Boyles' property. Plaintiffs offered in evidence, also, letters written by Abney to Joel Boyles, tending to show that he held Eliza for Mrs. Boyles. To the introduction of this testimony defendant objected, but his objection was overruled, and he excepted.

"It was further shown, that Abney paid hire for Eliza to Mrs. Boyles, at the rate of $75 per year; that Boyles and wife purchased from him, in 1849, a tract of land, for $150, and it was agreed that the hire of Eliza should go in discharge of the purchase money; and that Mrs. Boyles died in the fall of 1849. Defendant offered evidence, tending to show that he purchased Eliza from said Abney, for $875, on the 16th January, 1851, when possession was delivered to him by Abney, who also executed a bill of sale; that Abney had continued possession of Eliza from about frost, 1847, to the period of the sale to defendant, except on two occasions when he (Abney) had sent her to Mobile and New Orleans for a few weeks, for the purpose of selling her; and by these witnesses it was shown, also, that Abney, while having Eliza in possession, spoke of her and controlled her as his own property. No testimony was offered tending to show that defendant ever had actual notice of the claim set up by plaintiffs, prior to the commencement of this suit.

"The defendant then moved to exclude the deed as evidence before the jury of any notice to him of plaintiffs' claim; which the court refused, and instructed the jury, that so far as it was a deed of gift it was not in evidence, but as a deed of trust it was properly in evidence before them as a recorded deed, and in this respect it was sufficiently acknowledged; to all which defendant excepted.

"The court charged the jury, further, that if Boyles had negroes, and exchanged them for another, which was delivered, no deed would be necessary to make the transaction valid between the parties—the transfer would be valid when the property was delivered; but if it was understood by Abney, Boyles, and Mrs. Boyles, that Eliza should belong to

Mrs. Boyles, then a sufficient consideration passed to make her the property of Mrs. Boyles, the consideration passing from her husband to Abney; and to this charge the defendant also excepted.

"The defendant then asked the following charges:—

"1. That the deed under which plaintiffs claim, being a voluntary deed, does not operate as notice to defendant, because it was not recorded in the manner prescribed by the statute of frauds, and as to him it is as if it had never been recorded; which charge, without qualification, the court refused to give, and defendant excepted.

"2. That unless it is shown that defendant had actual notice of the title set up by plaintiffs, and the property remained in Abney's possession up to the time of defendant's purchase, then defendant's title is good, if he shows that he paid a valuable consideration for her; which charge the court refused, and defendant excepted.

"3. That Mrs. Boyles, by the terms of the deed exhibited by plaintiffs, was entitled to the possession of the property, and that the trustee (Abney) could not rightfully withhold the possession from her; and that if Abney held possession for three years, under a loan, without a demand made and pursued according to law, such possession will be held fraudulent, as against a *bona fide* purchaser without notice; which charge the court refused, and defendant excepted."

The rulings of the court on the evidence, the charges given, and the refusals to charge as requested, are now assigned for error.

R. C. Torrey, for the appellant.

Joshua Gray, *contra*.

GOLDTHWAITE, J.—The deed, under which the plaintiff below asserted his right to recover, purported to be made, not only on the consideration of natural love and affection, but "for divers other good considerations"; and although it may be questionable, in a contest in which the rights of creditors and purchasers were involved, whether a valuable consideration could be shown, to sustain a deed which upon its face is based upon a voluntary consideration only, yet where

(as in the present case) it appears that the conveyance was made upon other considerations which are not specified, as well as natural love and affection, the character of the deed is not changed by admitting parol evidence to show such additional considerations. Such proof is not inconsistent with the deed.—Hayne v. Campbell, 6 Mon. 291; Maigley v. Hauer, 7 John. 342; Benedict v. Lynch, 1 John. Ch. 270; Jack v. Dougherty, 3 Watts, 155; Tull v. Partlett, 1 Mood. & Malk. 472; Miller v. Bagwell, 3 McCord 568; Jones v. Sasser, 1 Dev. & Bat. 466; Mead v. Steger, 5 Port. 506.

The deed, being shown by the evidence to have been made upon a valuable consideration, was not affected by the clause of the statute (Clay's Dig. 255) which applies only to such conveyances as are made upon a consideration "not deemed valuable in the law."—Lazarus v. Lewis, 5 Ala. 459. It may not have operated as notice to the appellant; but, if it was made upon a valuable consideration, it was entirely immaterial, so far as the right of the appellee to recover was concerned, whether the defendant had any notice.

The letters of Abney, while in possession of the slaves, to the effect that he held for the grantee, were simply his written declarations, explanatory of his possession; and were properly admitted, as part of the *res gestæ*.—Perry v. Graham, 18 Ala. 822.

Neither are we able to perceive any error of which the appellant can avail himself, in the court's refusing to exclude the deed from the jury, or in the charges. There was no pretence for the exclusion of the deed,—the evidence showing it to be for a valuable consideration; and if it was properly before the jury, the instruction given by the court—that it was before them as a deed of trust, and not as a deed of gift—could not have prejudiced the appellant. So, also, in relation to the charge "that if the negro mentioned in the deed was received by Abney, (the grantor,) in exchange for other negroes owned by the husband of Mrs. Boyles, (the grantee,) upon an understanding with all the parties that she should be owned by Mrs. Boyles, the effect of the transaction would be, to make the latter the owner of the property",—although it may not have been correct, yet, as the deed was valid and effectual, it was purely abstract, and could not in any respect

have prejudiced the defendant; and when that clearly appears, an abstract charge, if incorrect, would not be regarded as a reversible error.—Magee v. Billingsley, 3 Ala. 680.

In relation to the charges requested, it is only necessary to observe, that the first assumes that the deed is voluntary, when the evidence established a valuable consideration, and it was therefore properly refused. The second asserts, in effect, that a purchaser without notice, from a person in possession of property not belonging to him, necessarily obtains a good title; which, as a legal proposition, cannot be sustained. And the third rests upon the assumption that the slave was loaned to the person in possession, when the evidence proved that it was a *bona fide* hiring.

We see no error in the record of which the appellant can complain. Judgment affirmed.

BYRD *vs.* McDANIEL.

1. After the dismissal of a bill for want of prosecution, the court has no jurisdiction to reinstate it at a subsequent term; but if the cause is reinstated at a subsequent term, and the defendant craves an appeal from the order, but afterwards engages in the defence—crossing interrogatories, entering into consent, &c.—he thereby waives his objection to the reinstating of the cause, and cannot take advantage of it on error.
2. When a bill is dismissed by the chancellor without a decision upon the merits of the case, and his decree is reversed on error, the safer practice is to remand the cause without determining its merits; thus enabling the parties to raise questions, and make motions, which may materially affect it, and which can only be made in the primary court.

ERROR to the Chancery Court at Greenville.

Heard before the Hon. J. W. LESESNE.

THE original bill in this case was filed in September, 1846, and the defendant answered in February, 1847. At the July term, 1847, on motion of the defendant, the bill was dismissed for want of prosecution, under the thirty-third rule of chancery

practice. In March, 1848, in vacation, the complainant filed a petition, asking that the order of dismissal might be set aside, and the cause be reinstated on the docket; and at the ensuing term the chancellor made an order granting the prayer of the petition—setting aside the previous order of dismissal, and reinstating the cause, on the payment of all costs; "and from this order the defendant, by his solicitors, in open court, prays an appeal to the Supreme Court, which is granted accordingly." The bill was subsequently amended, and the cause proceeded regularly to a hearing; depositions were taken by each party, service of interrogatories accepted, and cross-interrogatories filed; and the defendant made motions to suppress some of the complainant's depositions. The record does not show when the cause was submitted for final decree, nor when the final decree was rendered: it only shows that, on final hearing, the chancellor revoked and annulled the order reinstating the cause, and dismissed the bill, with costs; holding that the cause could not be reinstated after the close of the term at which it had been dismissed for want of prosecution.

The decree of the chancellor is now assigned for error.

JEFF. BUFORD, for the appellant:

1. When a bill is dismissed for the failure of complainant to appear at the time it is called for hearing, under the thirty-third rule of chancery practice, the power of the court to grant an application to set aside such default and dismissal is not limited or confined to the term at which such dismissal was made. Any other construction would render the last sentence of that rule nugatory; for, without any such provision as contained in that sentence, the court could grant such application at the term at which the dismissal was made. The only object of that provision in the rule was, to make it clear that the court could grant such application at a subsequent term.—Read v. Walker, 18 Ala. 333.

2. The court having the power to set aside the dismissal at a subsequent term, and having exercised that power by setting aside the dismissal and restoring the cause, it was erroneous to dismiss it at a subsequent term, in the manner and for the cause shown in the record.—State Bank v. Johnson & Jeffries, 9 Ala. 367.

3. The cause was finally dismissed, not for want of equity, nor for staleness of the demand, but solely because the court thought it had not power to set aside the default and dismissal. The court being thus "very erroneously influenced" to dismiss the bill finally, the dismissal must be reversed.—Grimshaw v. Walker, 12 Ala. 101; Cullum v. Casey & Co., 1 *ib.* 351; Shackelford v. King, 13 *ib.* 435.

4. Even if there was irregularity in setting aside the dismissal, the defendant waived all right to make objection thereto,—which waiver is evidenced in many modes in the record.—Hair v. Moody, 9 Ala. Rep.; Lampley v. Beavers, 25 *ib.* 534.

WATTS, JUDGE & JACKSON, *contra*:

The cause was first rightfully dismissed, under the thirty-third rule of chancery practice; the complainant not having appeared, either in person, or by counsel. The application to set aside this default should have been made at the same term at which the bill was dismissed. The "timely application", contemplated by the thirty-third rule, is an application within the term at which the default is made. The cause having been dismissed at a regular term, the court had no power over it at a subsequent term, and could not reinstate it.—Cullum v. Casey & Co., 1 Ala. 353.

Courts of chancery have distinct terms for the transaction of business, as well as courts of law; and it is an established principle in this State, that a court cannot grant a new trial after the close of the term at which the trial was had, unless a motion for a new trial was made and continued at that term. Fitzpatrick v. Hill, 9 Ala. 784; Barr v. White, 2 Port. 342.

At the regular term at which the cause was reinstated, the defendant objected to the irregular and illegal action of the court, by praying an appeal to the Supreme Court. What else could he do? It is said, that he afterwards crossed interrogatories, &c. *without protest.* But was he required, every time anything had to be done after the cause had been reinstated against his consent and objection, to do it under protest? It would be nonsensical to require this. He appealed, or craved an appeal, from the decision reinstating the cause, which shows that he objected to the action of the court. The

cause having been reinstated without his consent, he was not required to abandon it, nor to do everything afterwards under protest. What course could he have pursued to have the error of the chancellor corrected? It was an error of which he could avail himself only after final decree. Hair v. Moody, 9 Ala. 399, is wholly unlike this case, and it cannot be sustained on principle, if the exception to the ruling of the court was properly taken and presented.

NOTE BY REPORTER.—The arguments of counsel on the points touching the merits of the case are omitted, because those points are left undecided by the court.

CHILTON, C. J.—The chancellor was wholly without jurisdiction to reinstate this cause at a term subsequent to that at which it had been dismissed and finally disposed of, no motion having been made for reinstating at the term at which it was dismissed, and continued to such subsequent term. The defendant might, therefore, have treated the whole proceeding as *coram non judice*, after the cause was again put upon the docket, or (which would have been, perhaps, the more appropriate course) have applied to this court for the writ of prohibition, to arrest the unauthorized action of the chancellor in proceeding with a cause in the absence of jurisdiction.—He did not, however, do this; but when the cause was ordered to be reinstated, he appealed to this court, and, without taking any further steps, went on to engage in the defence, by crossing interrogatories, entering into consent, objecting to the proof as illegal, &c. Under these circumstances, the defendant must be considered as having waived his objection to reinstating the cause. The case of Hair v. Moody, 9 Ala. 399, is an express authority to this point, and we are not disposed to depart from the principle of that decision.

We might proceed to consider this case upon its merits; but we deem it the safer practice, when the court below has not determined upon the merits, to remand the cause, that it may do so, since, in many cases, great injustice may be done to suitors by depriving them of the right of raising questions, or of making motions, which might materially affect the merits, and which can alone be made in the primary court.

The statute is not imperative as to the rendition of a decree upon the merits in such cases (Code, § 3034); and such practice certainly conforms to the spirit of the constitution, which declares that this court "shall have appellate jurisdiction only," except in cases otherwise directed by it.

Decree reversed, and cause remanded.

RICE, J., having been of counsel for the appellant before his election to the bench, did not sit in this case.

DEARING *vs.* MOORE.

1. In trespass to recover damages for the battery of a slave, plaintiff introduced a witness who testified, that defendant and one R. were chasing the slave as a runaway with a pack of trained dogs belonging to defendant; that he heard the report of a gun, or pistol, in the direction the dogs were trailing, and when he reached a certain fence the defendant came up to him from a swamp on the opposite side of the field, "and told him that he came up with the negro in the field on horseback, that the negro turned on him with a large stick, that he retreated to keep out of the way of the negro, who said he would die before he would be taken, that he went to R. and got his pistol, and pursued the negro to the swamp, and came up near to him, and shot him just as the negro was turning on him:" *Held*, that defendant's declaration to said R. at the time he got the pistol and pursued the slave, in explanation thereof, were competent evidence for him as a part of the *res gestæ*.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. EDMUND W. PETTUS.

TRESPASS VI ET ARMIS by Alex. B. Dearing against John C. Moore, to recover damages for an assault and battery committed by defendant upon a slave named Bob, the property of the plaintiff.

"On the trial of the cause," as the plaintiff's bill of exceptions states, "the plaintiff introduced James M. Williams as a witness, who stated, that on the day plaintiff's said slave was shot, he was in his plantation; that the dogs commenced a sharp barking in a thicket near by; that he went to the

place, and discovered the camp of what he took to be runaway slaves, but saw no slaves; that he then went, and got the defendant, who had a pack of dogs trained to run slaves; that they took them to the camp, and the dogs took a trail, and followed on to near Kribb's factory, where they caught one negro man; that defendant put the negro thus caught into the possession of witness, and gave witness his pistol; that they learned from this negro that there was another with him, and that they had separated at a place mentioned by him; that they took the negro to show them the place where he had separated from the other, and the dogs there took the trail, and pushed through the woods to the field of Mr. Comegys; that defendant, and a Mr. Robinson who was with him, followed on the trail after the dogs, and witness went with said slave to the fence of the said field; that on his way there he heard the report of a gun, or pistol, in the direction the dogs had taken on the trail; that when he got to the fence of the field, defendant came to him from the swamp on the opposite side of the field, and told him that he came up with the negro in the field on horseback, and that the negro turned on him with a large stick, and that he retreated, to keep out of the way of the said negro, who said he would die before he would be taken; that defendant further told him that he went to said Robinson, and got his pistol, and pursued the negro to the swamp,—that the swamp was a bad thicket of vines, and briers, and *mirey*; that he hitched his horse, and pursued the negro into the swamp, and came up near to him, and shot him just as the negro was turning on him; that they brought the said negro out of the swamp, put him in a cart, and carried him to plaintiff, and that plaintiff sent for a physician."

The plaintiff then introduced the testimony of physicians, as to the nature and character of the wound which the slave had received, and proved that he had died about a year afterwards; also, the value of the slave, his hire, the trouble and expense of waiting on him, &c. The defendant then introduced one Dr. Leland as a witness, whose testimony tended to show that the death of the slave might have resulted from the improper use of surgical instruments. He then introduced said Robinson as a witness, "who stated, that he came to the

said field while the said slave was pursuing defendant with a large stick; that when the slave saw him, he turned and fled towards the swamp; that defendant got his pistol, and followed the slave to the swamp. Witness was proceeding to state what defendant told him, as he started to pursue said slave to the swamp, a short time before the slave was shot. Thereupon plaintiff objected to his stating what defendant so told him, but the court overruled the objection; to which ruling of the court the plaintiff excepted. Witness thereupon stated, that defendant told him not to follow the slave into the swamp, that he said he would not be taken—that he would die before he would be taken; to which declarations of defendant plaintiff objected, but his objection was overruled, and he excepted."

The admission of these declarations is the only error assigned.

E. W. Peck, for the appellant:

Although all that the appellee stated to the witness Williams, as well that which made for him as that which made against him, was properly received as evidence; yet it did not follow, that the jury would give the same credit to both: they might believe what he stated against himself, and disbelieve what he stated in his own favor.—1 Greenl. Ev. § 201, and cases there cited. It often happens, as in this instance, that a plaintiff can only prove his case by introducing the declarations of the defendant; and where such declarations are made after the defendant has discovered his danger, it is reasonable to expect that he will make them as much in his favor as he can; and if the truth is not utterly perverted, it is almost sure to be highly colored, and hence the reason of the foregoing rule. The appellee's counsel, aware of this rule, and fearing that the jury might be inclined to doubt the truth of all the appellee had said to exculpate himself, pressed the admissibility of his declarations to Robinson, to fortify himself against and to avoid the effects of this rule; and the court, in permitting this to be done, against appellant's objection, fell into error. It was permitting the defendant to strengthen his defence by his own declarations, or (in other words) to make evidence for himself.—Hooper

v. Edwards, 20 Ala. 530, and cases there cited; 5 Taunt. (top p.) 245.

W. MOODY, *contra*, contended that the evidence was admissible as part of the *res gestæ*, and cited the following cases: Pitts v. Burroughs, 6 Ala. 735; Williams v. Shackelford, 16 *ib.* 318; Yarborough v. Moss, 9 *ib.* 382; Hooper v. Edwards, 20 *ib.* 528; Jones v. Nirdlinger, *ib.* 490; Donnell v. Thompson, 13 *ib.* 440; Chambers v. The State, at this term.

RICE, J.—In an action of trespass for the battery of a slave, the jury are not confined to the actual injury sustained by the master, but may give vindictive damages. The master has the right to prove circumstances of aggravation. The defendant has the right to prove any matter which constitutes a bar to the action, and also any matter which the law permits the jury to consider in mitigation of damages.—Wheat v. Lowe, 7 Ala. R. 349; Gillian v. Senter, 9 Ala. R. 395; Mitchell v. Billingsley, 17 Ala. R. 391; Handy v. Johnson, 5 Maryland R. 459.

The plaintiff, in the present case, did not confine his evidence to the mere fact that the defendant shot his slave: he went beyond this, and gave in evidence circumstances which, if unexplained, might well have been regarded as matters of aggravation. Amongst other things, he proved by his witness Williams, that defendant kept a pack of dogs trained to run slaves; that defendant and one Robinson, with these dogs, were chasing plaintiff's slave (as a runaway); that the witness heard the report of a gun, or pistol, in the direction the dogs were trailing; that when he got to the fence of a certain field, the defendant came to him from the swamp on the opposite side of the field, "and told him he came up with the negro in the field on horseback, and that the negro turned on him with a large stick, and that he retreated to keep out of the way of said negro, who said he would die before he would be taken; that defendant further told him, he went to said Robinson, and got his pistol, and pursued the negro to the swamp, and came up near to him, and shot him just as the negro was turning on him."

After the plaintiff had adduced this evidence, and rested

his case, defendant "introduced the said Robinson, who stated that he came to the said field, while the said slave was pursuing the defendant with a large stick; that when the slave saw him, he turned and fled towards the swamp. Witness was proceeding to state what defendant told witness as he started to pursue the said slave to the swamp, a short time before the slave was shot. Thereupon the plaintiff objected to his stating what defendant so told him, but the court overruled the objection; to which ruling of the court the plaintiff excepted. Witness thereupon stated, that defendant told him not to follow the slave into the swamp, that he said he would not be taken, that he would die before he would be taken; to which declarations of defendant plaintiff objected, and his objection was overruled, and plaintiff excepted."

If these declarations of the defendant were mere naked declarations, they were improperly admitted; but if they formed part of the *res gestæ*, they were properly received. Declarations made by the actor at the time an act is done, and which explain the motive, design, or intent of its performance, and so harmonize with it as obviously to constitute one transaction, may be given in evidence as part of the *res gestæ*, whenever the nature of the act becomes a material question.—2 Phillips on Ev. (edition of 1839) pp. 585 to 600; Pitts v. Burroughs, 6 Ala. R. 733; Enos v. Tuttle, 3 Conn. R. 250.

It was not unlawful in defendant, after the manifestation of dire rebellion on the part of the runaway slave, to get a pistol and pursue him, for the purpose of apprehending him. But the plaintiff proved this act of getting the pistol and pursuing the slave to the swamp, and that it occurred a very short time before the defendant shot the slave. The nature of this act—the motive, or intent for thus getting the pistol and pursuing the slave—thus became a material inquiry in the cause; for, if that act were left unexplained, it might be used and treated as matter in aggravation of damages, because it might authorize the inference that the shooting of the slave, which occurred very soon afterwards, was a premeditated, cruel, and unnecessary act, unrelieved by the existence of a good motive, or other palliating circumstance. It was, therefore, important to defendant to repel any such inference; and the authorities make it clear, that his declarations at the time he got the pis-

tol from Robinson and pursued the slave, in explanation thereof, were competent evidence as part of the *res gestæ*.—2 Phillips on Ev., *supra*; Yarborough v. Moss, 9 Ala. R. 382; Pitts v. Burroughs, 6 Ala. R. 733; Williams v. Shackelford, 16 Ala. R. 318; 1 Greenl. Ev. §§ 108 to 110; Allen v. Duncan, 11 Pick. R. 308; Rice v. Bancroft, 11 Pick. R. 469.

There is no error in the ruling of the court below, and its judgment is affirmed.

DAWSON *vs.* COTTON.

1. A sealed instrument, in these words: "Twenty days after date I promise to pay to J. T., or order, $442, value received. Given under my hand and seal," &c., and signed "B. W. [seal] agent for C. C.": *Held* the obligation of B. W. only, and therefore not admissible evidence against C., when unaccompanied with the offer of extraneous proof explanatory of it.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. JOHN GILL SHORTER.

IN this action (Henry T. Dawson v. Cyrus Cotton) the writ was in *assumpsit*, and the declaration in *debt*, on a promissory note of which the following is a copy:—

"$442. Twenty days after date I promise to pay to James Thompson, or order, four hundred and forty-two dollars, value received. Given under my hand and seal, this 22d day of December, A. D. 1835. Benjamin Watson [seal],
Agent for Cyrus Cotton, Sen."

The plaintiff declared as the endorsee of the payee; and the defendant pleaded, *nil debet*, payment, and *non est factum*, the last plea being verified by affidavit. On the trial, as the bill of exceptions discloses, the plaintiff offered in evidence the note declared on, with the endorsement thereon; and the defendant objected to its introduction, "on the specific and single ground, that it was not, on the face of the note itself, signed and sealed in such a manner as to make the defendant

liable, but the agent only by whom it was executed (if any one) was liable. The court decided, that said note, on its face, was absolutely inadmissible before the jury, and therefore sustained the objection to it, and excluded it from the jury;" to which ruling of the court the plaintiff excepted, and was forced to take a nonsuit.

This ruling of the court is now assigned for error.

HOOPER & DUNCAN, for the appellant, cited the following cases: Martin v. Dortch, 1 Stew. 479; Skinner v. Gunn, 9 Port. 307; Stringfellow & Hobson v. Marriott, 1 Ala. 573.

JAMES E. BELSER, *contra*, cited Carter v. Doe *ex dem.* Chaudron, 21 Ala. 72; Skinner v. Gunn, 9 Port. 307; Oliver v. Dix, 1 Dev. & Bat. Eq. 162; Townsend v. Hubbard & Orcutt, 4 Hill (N. Y.) 351; Townsend v. Corning, 23 Wend. 442.

CHILTON, C. J.—The sole question in this case is, whether the note offered in evidence, unaccompanied with any offer of extraneous proof explanatory of it, was proper evidence for the jury: in other words, whether it created, *prima facie*, an obligation upon Cotton, the alleged maker. It is in these words:—

"Twenty days after date, I promise to pay to James Thompson, or order, four hundred and forty-two dollars, value received. Given under my hand and seal, this 22d day of December, 1835. (signed) Benjamin Watson [seal],
Agent for Cyrus Cotton, Sen."

In Martin v. Dortch, 1 Stew. 479, a sealed instrument, executed substantially as the above, was held to be well executed by the person for whom the maker described himself as agent; but this decision was virtually overruled in Skinner v. Gunn, 9 Porter 305, and (we think) cannot be regarded as a correct exposition of the law. We perceive no difference, in principle, between this case and that of Skinner v. Gunn, *supra*. True, in that case, the body of the instrument read, "I, Isaac Hughes, for and in consideration," &c., and concluded, "In witness whereof I have hereunto set my hand and seal"—(signed) I. Hughes [seal], attorney for Livingston Skinner;" while in this case, the name is not put in appo-

sition with the pronoun. But it is too clear to admit of any doubt, that the pronoun stands for Watson, whose seal is attached, and who, in the attestation, says, "witness my hand and seal." It is, in our opinion, the seal and obligation of Watson, and the addition of "agent for Cyrus Cotton, sen.," must be regarded as descriptive of the person.—See Carter v. Doe *ex dem.* Chaudron, 21 Ala. Rep. 72, where the principle here involved is incidentally discussed, and a number of the authorities cited.—Story on Agency, § 151; Story on Contracts (3 ed.) §§ 141, 142. Whether a different interpretation might not be given to the instrument, if it had not been under seal, it is not necessary now to decide.

Let the judgment be affirmed.

RICE, J., having been of counsel, did not sit in this case.

LANDMAN ET AL. *vs.* SNODGRASS.

1. A testator bequeathed the whole of his property, both real and personal, to his wife during her natural life, "with the following exceptions: I give and bequeath the special legacies to my three daughters hereinafter named.—I give my daughter Frances one negro girl named Maria, to my daughter Lina one negro girl named Aggy, and to my daughter Mary Ann one negro boy named Alick; which latter named negro, Alick, I give to my daughter Mary Ann, and to the heirs of her body; *and in the event that Mary Ann should die without any such heirs, it is my will, that said boy return to my estate, to be disposed of as the rest of my property.* It is further my will, that at the death of my wife, the whole of my estate, both real and personal, be equally divided among all my living children, or to the living heirs of their body, the three above-named daughters to receive an equal proportion in common with the rest of my children, notwithstanding the above-named special legacies; provided, however, that the portion falling to my daughter Mary Ann be subject to the same requirements that are made in reference to the boy Alick given to her above." Mary Ann was unmarried at the time of the execution of this will, and also at the testator's death, but she afterwards married, and had one child born, who died before her; and upon her death without issue surviving her, the surviving children and grandchildren of the testator brought detinue against her husband for the boy Alick: *Held*, that the words of the will must be construed in their legal sense, to mean an indefinite failure of issue, and therefore the limitation over was void for remoteness, and Mary Ann took the absolute interest in Alick.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. THOS. A. WALKER.

DETINUE by the appellants against John E. Snodgrass, for a slave named Alick; plea, *non detinet*, in short by consent.

On the trial, as appears from the bill of exceptions, the plaintiffs introduced as evidence the will of William Landman, deceased, which was as follows:

"I, William Landman, of the county of Madison, and State of Alabama, being in perfect mind and memory, do make, ordain, and publish this my last will and testament, in the manner and form following, viz.: I loan to my wife, Frances Landman, the whole of my estate, both real and personal, including land, negroes, stock of every description, household and kitchen furniture, &c., during her natural life; out of the proceeds of which, including my present crop, it is my wish, that she should pay all my lawful debts, and raise and school my children; with the following exceptions, viz.: I give and bequeath the special legacies to my three daughters hereinafter named—I give my daughter Frances one negro girl named Maria, to my daughter Lina one negro girl named Aggy, and to my daughter Mary Ann one negro boy named Alick; which latter named negro, Alick, I give to my daughter Mary Ann, and to the heirs of her body; and in the event that Mary Ann should die without any such heirs, it is my will, that said boy return to my estate, to be disposed of as the rest of my property. It is further my will, that at the death of my wife, Frances Landman, the whole of my estate, both real and personal, be equally divided among all my living children, or to the living heirs of their body, the three above-named daughters (Frances, Lina, and Mary Ann) to receive an equal proportion in common with the rest of my children, notwithstanding the above-named special legacies; provided, however, that the portion falling to my daughter Mary Ann be subject to the same requirements that are made in reference to the boy (Alick) given to her above.

"In testimony whereof, I have hereunto subscribed my name on the day and date above mentioned," &c.

"It appeared in evidence, also, that after the death of said testator, said slave, with the assent of the executor, passed

into the possession of said Mary Ann, with whom the defendant intermarried in 1843, and after such intermarriage the defendant had possession of said slave, until the death of said Mary Ann in August, 1852. The plaintiffs James Landman, Samuel Landman, Elizabeth Simmons, and Lina Beadle, are children of said testator, and the brothers and sisters of said Mary Ann; and the other plaintiffs, who are described in the writ and declaration as infants under twenty-one years of age, are grandchildren of said testator, whose parents have died since said testator. Frances Landman, the widow of said testator, is yet living. James Landman is the administrator with the will annexed of said testator. Mary Ann died, leaving no child surviving her; but there was a child born of her marriage, who died in her lifetime.

"On this state of facts, the court charged the jury, that Mary Ann, under the provisions of said will, on taking possession of the boy Alick, became absolute owner, and that the defendant, by intermarriage with her, and taking possession of said boy, acquired an absolute title to him, of which plaintiffs could not divest him in this action; and to this charge the plaintiffs, by their counsel, excepted."

The charge of the court is now assigned for error.

C. C. & J. W. Clay, for the appellants:

I. The *intention* of testator, gathered from the whole will, is the law of devises, and will govern the court in its construction, if that intention be consistent with the rules and policy of the law.—Ram on Wills, 1 (8 Law Lib.); Powell v. Glenn, 21 Ala. 466; Smith v. Bell, 6 Peters 68. The rule, that a remainder may be limited after a life estate in personal property, is as well settled as any other principle of our law. The attempt to create such limitations is not opposed by any rule or policy of the law. If such intention is manifested, the courts will sustain it.—6 Peters, *supra*. Chancellor Kent (4 Comm. 282) says: "In bequests of personal property, the rule [that the words *dying without issue*, &c., make an estate tail] will more readily than in devises of land, be made to yield to other expressions or slight circumstances in the will, indicating an intention to confine the limitation to the event of the first taker dying without issue living at his death. The courts,

according to Mr. Fearne, lay hold, with avidity, of any circumstance, however slight, and create almost imperceptible shades of distinction, to support limitations over of personal property."—And so Willis's Lessee v. Bucher, 3 Wash. C. C. R. 369.

II. With these principles in view, it is obvious, that Wm. Landman did not intend his daughter, Mary Ann, to take an absolute estate. He gave his daughters, Frances and Lina, each, a negro girl, without condition or qualification, showing that he fully intended their interests to be absolute; and if he had intended Mary Ann's to be so, he would have used similar language. (2.) This view is strengthened by looking to Mary Ann's condition in life, which may legitimately be considered, to ascertain testator's meaning, and the motives influencing him to give her less than an absolute estate. Smith v. Bell, *supra*. A reasonable motive is found in the fact, that she was an unmarried daughter, (see bill of exceptions,) and probably the youngest (as she is mentioned last, of testator's special legatees.) He wished to protect her and her children (if any) against the improvidence of any future husband, by disabling him from acquiring an absolute estate, with the power of alienation.

III. That testator did not intend to create an estate tail, is manifest from the following considerations:

(1.) The property bequeathed is *personal*, and not only that, but a *male* negro, incapable of increase, and, therefore, incapable of transmission, individually, or in his offspring, to an indefinite succession of heirs. It is absurd to suppose, that any person, with sense enough to make a valid will, would seek to create a perpetuity in a *male* negro. The testator could not, therefore, have so intended, but, "by heirs of her body," meant *children*, as people, unversed in legal technicalities, generally understand and use the term.

(2.) This is further shown by the disposition to be made of Alick, after Mary Ann's death, i. e. to whom he was to go: "In the event Mary Ann should die without any such heir, it is my will that said boy return to my estate to be disposed of as the rest of my property." He subsequently declares his will, that his "whole estate be equally divided among all my *living children* (*or* the *living* heirs of their body)",—that is, to

his children who might be "living" at Mary Ann's death, and the *living* children of such of his children as might be dead at that time. McGraw v. Davenport and Wife, 6 Port. 332, shows that "*or*" may be construed "*and*", to carry out the manifest intention of a testator, and that a limitation over to grandchildren is not too remote.—So Doyle v. Bouler, 7 Ala. 246, as to the latter.

The limitation over was to take effect (if at all) immediately Mary Ann should die; for, if she could ever have "heirs of her body", they must be then in being, and, if not then, they never could be thereafter. It was to take effect at Mary Ann's death, in Alick's lifetime. These two facts, conjoined, prove, incontestably, that the testator did not intend the limitation over to be suspended until after an indefinite failure of issue, but to take effect upon Mary Ann's dying without children living at the time of her death. If so, "heirs of her body", are words of purchase, and not of limitation; Mary Ann took a life estate only, and the limitation over is good by way of executory devise.—Woodley v. Findley, 9 Ala. 716.

The cases of Williams v. Graves, executor, (17 Ala. 65,) and Powell v. Glenn, (21 Ala 465,) present a similar point. It is true, William Landman does not use the words "survivor" or "surviving", but his language imports the same. He directs an equal division, at the death of first taker, among his living children, (who are, in fact, *surviving* brothers and sisters,) and the *living* children of such of them as might be dead. The devisees bear the same relation to the devisor, but are differently designated. He calls them his "*living* children", instead of Mary Ann's *surviving* brothers and sisters.

To the same effect are Jackson v. Christman, 4 Wend. 277; Cordle v. Cordle, 6 Munf. 455; Moffat v. Strong, 10 John. 13, and many other cases, where the term *survivor*, or *surviving*, is used. The term "*living*", applied to the "heirs of their (his children's) body", will, we apprehend, have the same effect as when applied to his children; since the relationship is not important, but whether or not the will sufficiently designated those who were to take the limitation over, by which to determine whether or not that limitation is too remote.

The case of Pells v. Brown (Cro. Jac. 590) is in point. There, the testator devised certain lands to his son Thomas, "and if Thomas died without issue, *living* William his brother, that then William his brother should have those lands, to him and his heirs and assigns forever." Thomas died without issue, *living* William, and the court declared the limitation over good as an executory devise, the devise being of lands, where the rule is more strict than in cases of personal bequests. Wm. Landman gave Alick to Mary Ann and the heirs of her body, "and in the event Mary Ann should die without any such heir," to "be equally divided among all my *living* children (or the *living* heirs of their body)." This is a fair statement of testator's will; for the omitted words do not alter his intention as to the ultimate destination of Alick. Except in the property bequeathed, wherein does this case differ from Pells v. Brown, a leading case, never overruled? See Greenl. Overruled Cases.

In Johnson. v. Curvin, (10 Barr 498,) a devise was made to the testator's daughter, her *heirs and assigns*, and "if any of my daughters die, *without heirs of their body*, their part to be equally divided between the *survivors* of them and my grand children, counting A's children as one and B's children as one." Held, that this was an executory devise to the grandchildren and the surviving daughters, and not a remainder, which could be barred by the first taker. A will contained the following clause: "I wish the property, which I bequeath and bestow on Sarah A. Truly, to be given and secured to herself and *her bodily heirs*, should she marry, and at her death, *should she have no issue*, it is to go to her brothers and sisters." Though "surviving" was not in the will, and there was no other word qualifying "brothers and sisters",—held, this was not an estate tail, but an executory devise.—Rucker v. Lambdin, 12 S. & M. 230. A devised as follows: "I give unto my nephew I., my slave S.; in case the said I. should die *without lawful heirs of his body*, I give the said slave S. to my nephew T." Held, the limitation over was not void, as being too remote.—Biscoe v. Biscoe, (6 Gill & John. 232). The *designatio personarum*, in none of these cases, is more certain than "my *living* children, or the *living* heirs of their body," is in Landman's will.

In Jackson v. Staats, (11 John. 338,) the testator, after sundry bequests of real and personal estate to his sons and daughters, &c., says: "and if any one or more happens to *die without heirs*, his or their parts or shares shall be divided among *the rest of the children*." The court assimilated it to Moffat v. Strong, *supra*, where the will said, "and if any of my sons should *die without lawful issue*, then let his or their part or parts be divided equally among the *survivors*", &c., and held, that the two cases must receive the same construction, and the devise should go over to the testator's surviving children. This case seems very much in point: for Landman's will is, "in the event Mary Ann should *die without any such heir* [of her body] it is my will, that said boy return to my estate to be disposed of as the rest of my property", and then directs the rest of his property, after his wife's death, to "be equally divided among *my living* children, (or the *living* heirs of their body,)" &c. This presents quite as strong, if not a stronger case, than the will in Jackson v. Staats did, for the plaintiffs. Here, my *living* children, or the *living* heirs of their body," is the language—there, "the *rest* of the children." Here, the limitation over is to take effect after *a dying without any heir of her body*—there, after *a dying without heirs*. Jackson v. Staats is a leading case in New York, and the opinion of the learned and able Judge Spencer was concurred in by all the court. See, also, Diehl v. King, 6 Serg. & R. 29.

IV. What effect have the words, "return to my estate", in explaining testator's intention? He, certainly, did not mean them to be taken literally: for he appointed no executor to keep together his estate, and he so disposed of it, as to have none for Alick to return to, either before or after his wife's death. He probably attached no particular meaning to these specific words, but intended to express the general idea, conveyed by the entire sentence, that he wished Alick "disposed of as the rest of my property." The words, however, bear a construction favorable to the plaintiff's claim. In Moseby v. Corbin, (3 A. K. Marsh. 289,) where a testator devised a slave to A. for life, and, *if she should die without issue*, then the slave and her increase *to return to his estate* after the death of her husband, it was held, that "without issue" meant without

issue living at her death. May not the words "return to my estate" in Landman's will, likewise, limit the words "die without such an heir", to an heir living at Mary Ann's death, and thus render the limitation over effectual?

V. If it is assumed, that the birth of a child to Mary Ann defeated the limitation over, the language of the will, "die without such an heir" ["of her body"], is a conclusive answer. The child died in Mary Ann's lifetime: hence she never had "an heir of her body." "*Nemo est hæres viventis.*" The point has been directly decided in Connecticut. A devised his real estate to his four sons, their heirs and assigns forever, and, if either of his sons should "die without children, his brothers should have his part in equal proportion." B, one of the sons, died without issue, *though he had a child, which died during the lifetime of the father.* Held, that the limitation over was good by way of executory devise, and that by the words, "die without children", was intended a dying without children living at the death of the first devisee.—Morgan v. Morgan, 5 Day 517. In cases of personalty, the term "dying without issue," is construed to mean without *leaving* such, if in accordance with the intent of the testator.—Hopkins v. Jones, 2 Barr 69; Holmes v. Williams, 1 Root 332. We have not met with a case to the contrary in English or American Reports. The words, dying without issue, or without heirs, and the like, are always referred to issue, heirs, &c., living *at* or *after* the death of the first taker, from the old cases of Targett v. Grant, (Gilbert's Eq. R. 149,) Denn v. Shelton, (Cowp. 420,) Pinbury v. Elkin, (1 P. Wms. 563,) and Forth v. Chapman, (*ib.* 663,) down to this time.

JAMES E. BELSER, *contra*, contended that the charge of the court was correct in its result, and cited Hamner v. Smith, 22 Ala. 433; Isbell v. Maclin, 24 *ib.* 315.

GOLDTHWAITE, J.—It may be remarked, that in bequests of personal property, where words are used by the testator which, without explanation, import an indefinite failure of issue, courts have frequently shown a stronger inclination to bend the rule of construction to the presumed intention of the testator, than in devises of real estate, and have allowed

circumstances to control the words in the first case, which they have conceded to be insufficient in the last.—Forth v. Chapman, 1 P. Wms. 663; Doe v. Lyde, 1 Term R. 593; Doe v. Ewart, 7 Ad. & El. 636; Moffat v. Strong, 10 Johns. R. 12; Newton v. Griffith, 1 Har. & Gill 111; Royall v. Eppes, 2 Munf. 479; Brummett v. Barber, 2 Hill's S. C. 544-45; Williams v. Turner, 10 Yerg. 287; Mazyck v. Vanderhost, 1 Bail. Eq. 48. But there is great question as to the soundness of this distinction.—Arnold v. Congreve, 1 Taml. R. 347; Zolicoffer v. Zolicoffer, 3 Bat. 438. Be this as it may, however, all the authorities at this day agree, that words like those used in the present will, (such as "dying *without heirs*," or "without issue," or "*on failure of issue*",) without explanation, mean an indefinite failure of issue, and must be so construed, unless from the language or circumstances of the other parts of the will, it is ascertained they were not used by the testator in that sense; in which case, the rule of construction yields, and the intention prevails.—4 Kent's Com. (7th ed.) 273; Williams v. Graves, 17 Ala. 62. Unless, therefore, on an examination of the will before us, we find something in it which indicates that the testator did not intend to use the words importing an indefinite failure of issue in that sense, there is an end of the case. It would be unnecessary to go farther, and inquire what indications of a different intention were necessary to overcome the language employed. We must, of course, be governed by the rule which has repeatedly received the sanction of this court, (Isbell v. Maclin, 24 Ala. 315, and cases there cited,) and construe the words in their legal sense.

It is supposed by the counsel for the appellants, that some evidence that the words referred to were intended to mean a definite failure of issue, is to be found in the character of the bequests made by the testator to his other two daughters. The argument is, that it is apparent that it was not the intention of testator to give the slave to Mary Ann absolutely, as he had given the slaves bequeathed to his other daughters; and as the words employed by him in the bequest to the former, if construed to mean an indefinite failure of issue, would necessarily produce this result, that construction should not be given to them. We cannot yield our assent to this rea-

soning. It may be conceded, that the testator did not intend to confer the absolute interest in the slave on Mary Ann, and if she takes that degree of interest in the bequest, it is not because it was so intended by the testator, but because the limitation over which was intended by him is void as against the policy of the law; and this limitation being void, leaves the entire interest in the first taker.

Neither can we regard the sex of the slave bequeathed as affording any indication of the intention of the testator to use the words in a different sense from that which the law ordinarily attaches to them. It is true, that this circumstance would be conclusive to show that the testator did not mean to create a perpetuity; but we do not regard such an intention as necessary to avoid the limitation. The law denounces settlements or bequests of this character, made with regard to this species of property, because the result of them, if allowed, would be to lock up and restrain it from alienation for an indefinite period of time, which might extend through generations.

It is also urged, that the limitation to the "living children" of the testator, or "the living heirs of their body", on the demise of Mary Ann without heirs of her body, tends to show that the testator must have meant dying without such heirs living at her death; and the case of Williams v. Graves, 17 Ala. 62, is relied on to sustain that position. In that case, the bequest was to the testator's two daughters "and the heirs of their bodies begotten"; and if either of the daughters was to die "without such an heir", the slaves bequeathed to her were to pass to the "survivor", and the testator's two sons. *It was held*, that the word "survivor" limited the meaning of the words "without such an heir", to issue living at the death of the first taker. Here the use of the word referred to showed that the slaves given to one daughter were to pass to the other, as soon as she became the survivor, if at all; and in that view, the limitation could not have taken effect, if an indefinite failure of issue had been intended. But had the words been such as indicated an intention which might have taken effect after that point of time, had the issue failed, a very different case would have been presented. In other words, had the limitation been to the survivor, if living, but

to her heirs, or the heirs of her body, if dead, it would then have denoted the intention of the testator, that the limitation over was not dependent upon the survivorship alone, but depended rather on the failure of issue, and would therefore be void. Here the testator provides, that if the first taker dies without heirs of the body, the property given to her shall return to his estate, and be equally divided among his "living children," or the "living heirs of their body"—that is, if on the failure of issue of the daughter, the testator had children living, the property was to pass to them; and if they were dead, their issue were to take in their place.

Taking the whole will together, and as to the slave in question, we think the meaning of the testator cannot be mistaken. His object was, to provide for an unmarried daughter. He did so by a bequest of property which he intended to continue with her and her posterity, until the one ceased to exist, and the other became extinct; and if these events happened before the death of the slave bequeathed, he was to return to the estate, and become the property of the other children of the testator, if living, and to their posterity, if dead. This disposition of property is entirely in accordance with our natural affections and instincts, but it is one which the law, for reasons of its own, does not tolerate, and which courts professing to be governed by precedents long established and firmly adhered to, cannot sustain.

Judgment affirmed.

RICE, J., having been of counsel, did not sit in this case.

SMITH ET AL. *vs.* PEARSON.

1. A liability to pay hire for slaves, upon an implied promise, will only be raised against the person who had their possession and services.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the Hon. JAMES B. CLARK.

JEFFERSON FALKNER, for the appellant.

WHITE & PARSONS, *contra*.

RICE, J.—The bill in this case was filed by the appellee, to redeem certain slaves which he had conveyed to Isaac T. Smith and Isaac Smith, by a bill of sale absolute on its face. Among other things, the bill alleged, that the appellee borrowed a certain sum of money at the time said bill of sale was executed, and that the bill of sale was executed as a mere security for the money so borrowed, and was so understood at the time by all the parties. After the filing of the bill, Isaac T. Smith died, and Mary Smith became the administratrix of his estate, and a party to this suit as such administratrix. The right of the appellee to redeem the slaves was established by a decree of the chancellor, which was affirmed by this court at its January term, 1854.—Smith *et al.* v. Pearson, 24 Ala. 355. Since that affirmance, an account has been taken in the court below under said decree, to ascertain the amount of money lent to the appellee, and interest thereon, and the amount of the annual hires of said slaves. From the account so taken it appears, that after paying off the amount of money lent to the appellee, and interest thereon, out of the hires of the slaves, there remains due to the appellee, for the hires of the slaves, a balance of four hundred and forty-four dollars, one and a half cents; and that, for this balance, the chancellor rendered a final decree, and awarded execution against Isaac Smith, as well as against the said administratrix of Isaac T. Smith. It appears, also, that the slaves went from the possession of the appellee into the possession of Isaac T. Smith, and continued in his possession until his death, and ever since his death have been in the possession of his administratrix, (who is his widow). The slaves have never been in the possession of Isaac Smith.

We know of no principle recognized by courts of equity, which authorizes the decree, so far as it makes Isaac Smith liable for the balance remaining due for the hire of slaves which never were in his possession, but have been continuously in the possession of Isaac T. Smith (the very person to whom appellee delivered them) and of the legal representative of said Isaac T. Smith. There was no express contract of hire.

And when resort is had to a court of equity, or a court of law, to charge a party for the hire of slaves, upon the idea of an *implied promise* to pay hire, the liability will only be implied against the party who had the possession and services of the slaves. Such seems to us to be the dictate of reason and justice.—Harris v. Davis, 1 Ala. 259; Westmoreland v. Davis, 1 *ib.* 299; Elliott v. Boaz, 13 *ib.* 535.

We have carefully examined the evidence, and all the matters assigned for error; and we cannot say that the chancellor erred in any other respect than in adjudging Isaac Smith to be liable for the balance of the hire of the slaves as above shown. For the error in this particular, the final decree is reversed, and here rendered in favor of the appellee, in all respects as in the court below, except that there is to be no decree against Isaac Smith for any portion of said sum remaining due for the hire, to-wit, said sum of four hundred and forty-four dollars, one and a half cents. The appellee must pay the costs of this court.

BENNETT *vs.* FAIL & PATTERSON.

1. Where the purchaser of slaves, on discovering their unsoundness, wrote to the vendor, informing him of that fact, and tendering them back; and the vendor, in reply, objected that the offer to rescind was made too late, and referred the purchaser to his warranty for indemnity: *Held*, that these letters did not amount to a rescission of the contract, when it was shown that the purchaser had afterwards brought suit on the warranty.
2. If the vendor refuses to accept the property when the purchaser offers to return it, this will dispense with a more formal tender; but the purchaser, if he still retains the property in his possession, must yield it up on the reasonable demand of the vendor, and his refusal to surrender on such demand, even after suit brought, will destroy the effect of his previous tender.
3. Although the opinion of a physician as to the length of time a disease has existed, predicated upon present symptoms, is not equal to positive proof of the fact of its existence; yet, where he testifies to the existence of certain diseases from a personal examination, upon which he founds his opinion as to the length of time they have existed, it is error to instruct the jury, "that the testimony of physicians is matter of opinion merely."
4. On a question of the soundness of a slave, a witness may testify that "she *appeared to be healthy*;" and if the party against whom the evidence is offer-

ed desires to ascertain what the appearances were which the witness denominated healthy, he must elicit such proof on cross-examination.

APPEAL from the Circuit Court of Dallas.
Tried before the Hon. NAT. COOK.

ASSUMPSIT by Fail & Patterson against Bowen Bennett, on a promissory note for $2,100, which was shown to have been given for the purchase money of three slaves sold by plaintiffs to defendant; pleas, *non assumpsit*, fraud, failure of consideration, and want of consideration.

On the trial, after the plaintiffs had offered in evidence the note declared on, the defendant proved that it was given for the purchase money of three slaves—Mary Jane, Nancy, and Judy—sold by plaintiffs to him at one time on 28th January, 1852, and as one entire contract, and then introduced the bill of sale, containing warranties of soundness and title. The circumstances under which the sale was made, as deposed to by the witnesses, are stated at length in the bill of exceptions, but they present no point for consideration in this court. On the part of defendant, Doctors Riddle, Howell, Robbins, and Hutchinson were examined as witnesses, and they testified, substantially, that they had examined each one of the negroes a few weeks after they had went into the defendant's possession; that Mary Jane had syphilis, Nancy chronic gonorrhea, and Judy umbilical hernia; that their professional opinion, founded on their personal examination of the slaves, was, that each of these diseases must have existed from a period anterior to the sale to the defendants; and that the slaves, at the time of their examination, stated such to be the fact. On the part of the plaintiffs, Dr. Matheson testified, that he examined the slaves about six weeks after the sale, at the request of the plaintiffs, and his professional opinion was, that Mary Jane and Nancy had not been diseased more than three weeks, and that Judy's disease was not a bad case of hernia, but was curable, and did not greatly impair her value; and Doctors Troy and Bythwood, who were examined for the plaintiffs, stated that they did not concur with Dr. Riddle, from the symptoms which he described, as to the character and degree of Mary Jane's disease. There was other evidence on the question of unsoundness, which it is unnecessary to detail.

"The plaintiffs offered to prove, also, by one Quartemus, that within a few weeks past, and since the last term of this court, he saw the slave Mary Jane at the house of one J. H. Campbell in this county, and that she appeared to be healthy. The witness was a mechanic, who had been working on said Campbell's house. The defendant objected to the introduction of witness for that purpose, but the court overruled the objection, and the witness testified to the facts stated; and to this the defendant excepted."

The defendant offered in evidence a letter written by himself to plaintiffs, which was produced by them on notice, and also their reply thereto, of which the following are copies:—

"Mr. D. A. Patterson & J. Fail:—The man you sent the note to me, that was given for the negroes, the next week after I purchased them, I told him to tell you that the negroes were unsound. I apprise you that one of them is under the doctor's attention, and he declares her unsoundness of some years' standing. I do not believe he can cure her. I tender you the negroes back before more expense occurs.

"March 1, 1852. "Bowen Bennett."

"Camden, March 1, 1852.

"Mr. Bowen Bennett: Dear Sir—We received your note, stating that the negroes we sold you were not sound. You should have tendered the negroes sooner; but if you can prove that there was any latent or hidden disease, you can certainly make us accountable. We have a bill of sale that will make us safe. You should have delivered the negroes before this late hour.

"Yours, D. A. W. Patterson & J. Fail."

The defendant introduced one Burns as a witness, who testified, "that on the 14th or 15th February, 1852, he was sent by plaintiff Patterson, with the note, to Bowen Bennett, to collect it, or get a payment upon it; that Patterson told him to get the money on the note, or, if he could not get the whole of it, to get him to pay four hundred dollars on it, as he was pressed for money, but that if he would do neither, then to offer to take back the negroes, and if Bennett would not do that, then to stay and board it out with him; that when Bennett refused to pay the money, he did offer to take the negroes back; that he made this offer but once, and did not press it,

and he could not state what reply Bennett made at that time to the proposition; that Bennett refused to pay the note, and gave as a reason for not doing it that the negroes were unsound, and told him to tell Patterson so, and that he would not pay the note, and for him (Patterson) to come and take his negroes away. He stated, also, that he communicated this to Patterson on the same day, who was then within about six miles of Bennett's residence surveying, and that Patterson did not deny the unsoundness. It was further in proof, that the plaintiffs and the defendant lived from twelve to fifteen miles apart, and that the Alabama river intervened.

"The plaintiffs, in reply, offered to show by one Kane, that after this suit was brought and pending, and another one by defendant on plaintiffs' warranty, plaintiffs offered to give defendant the note sued on, and to take the negroes back, and that defendant refused to do so. Defendant objected to this, but the court allowed the witness to be examined, and he so testified; and defendant excepted.

"The plaintiffs next offered in evidence the record of the undetermined suit of defendant against them on their warranty, and the defendant objected; but the court overruled the objection, and allowed the record to go to the jury, and the defendant excepted.

"The foregoing evidence being before the jury, the court, among other things, charged the jury, that the foregoing letters in proof did not show a rescission of the contract of purchase; to which charge the defendant excepted.

"The court charged the jury, also, that the testimony of physicians was matter of opinion merely, but that they should be controlled by the weight of evidence, and the superior conviction it made upon their minds; to which charge, also, the defendant excepted."

The defendant asked three charges, which were severally refused, and to each refusal he excepted. They were—

"1. That defendant's letter to plaintiffs, dated March 1, 1852, and plaintiffs' reply of the same date, taken together, make a rescission of the contract, if defendant's said letter and tender was written and made within a reasonable time, and the slaves were unsound at the time of the purchase, and plaintiffs knew it.

"2. That if the note sued on was procured by fraud, plaintiffs cannot recover, whether there was an offer to return the slaves or not.

"3. That no offer to re-deliver the slaves was necessary, after plaintiffs' refusal on the first of March, 1852, to receive them back on defendant's tender by letter, as the law does not require an unnecessary act to be done."

The rulings of the court on the evidence, the charges given, and the refusals to charge as requested, are now assigned for error.

GEO. W. GAYLE and J. H. CAMPBELL, for the appellant:

1. On the question of fraud in the original contract, see Kennedy v. Kennedy, 2 Ala. 571; Huckabee v. Albritton, 10 *ib.* 657; Milton v. Rowland, 11 *ib.* 732; Swift v. Fitzhugh, 9 Port. 39; Forrest v. Camp, 16 Ala. 642; Carter v. Castleberry, 5 *ib.*; Stokes v. Jones, 21 *ib.* 731; 5 Cowen's R. 67; 1 Smedes & M. Ch. 375; 4 Coke's R. 786; 15 Johns. 121; Andrews v. Montgomery, 19 *ib.* 164; Ross v. Lane, 3 Smedes & M. 695; Baringer v. Nesbit, 1 *ib.* 22; Dill v. Camp, 22 Ala. 249.

2. That the facts showed a rescission of the contract, see Burnett v. Stanton & Pollard, 2 Ala. R. 182; Duckworth v. Johnson, 8 *ib.* 309; Whitehurst v. Boyd, 8 *ib.* 375; Martin v. Chapman, 6 Port. 344; Magee v. Billingsley, 3 Ala. 679; Dill v. Camp, 22 *ib.* 249; Milton v. Rowland, 11 *ib.* 732.

3. That the court erred in its charge upon the testimony of the physicians, see 7 Wend. 78; 1 McNally on Evidence, pp. 329-35; 8 Mass. Rep. 371; 9 *ib.* 225; 5 Miller's R. 275; Washington v. Cole, 6 Ala. 212; Patton & Burgen v. Rambo, 20 *ib.* 487; Tullis v. Kidd, 12 *ib.* 648; 1 Phil. Ev. 290; 1 Greene's R. 232.

4. That the court erred in admitting the testimony of Kane, see Jackson *ex dem.* Calden v. Rich, 7 Johns. 193.

WM. M. MURPHY, *contra*, cited the following authorities:

1. To show that there was no rescission of the contract, Burnett v. Stanton & Pollard, 2 Ala. 181; Barton v. Stewart, 3 Wend. 236; Dill v. Camp, 22 Ala. 259.

2. To show that the charge of the court was correct, which

asserted that the testimony of physicians was matter of opinion merely, 1 Greenleaf's Ev., §§ 440, 441, and notes.

CHILTON, C. J.—There was no error in the charge, that the letters which passed between the parties did not show a rescission of the contract. This charge must be considered with reference to the proof shown in the record; and it is clear from this, that whatever may have been Bennett's inclination when he wrote to the appellees, informing them of the unsoundness of the slaves, and saying that he tendered them back, the appellees did not assent to any rescission, but insisted on the contract, referring Bennett, for his indemnity, to their warranty; and Bennett's subsequent conduct shows that he sought this mode of redress. The record shows that he brought his action upon the warranty, thereby affirming the contract.

But again: A tender, to be available, must be continuous; that is to say, if a party says he tenders property, and the other, to whom the tender is made, says he will not accept, this refusal to accept may dispense with a more formal tender; but if the party tendering it retains it in his possession, he must yield it up on the reasonable demand of the other. He keeps it as the property of that other, having by his tender disaffirmed the contract, and thereby having vested the property in the vendor, retaining it, it may be, from considerations of humanity, as the vendor's unwilling bailee. If, however, upon the demand of the vendor, who has never consented to a rescission, the purchaser refuses to surrender it, he affirms the contract, and destroys the effect of his previous tender; and we see no reason why this affirmance may not be made as well after suit brought as before. The effect of such affirmance would be, to let the contract stand,—the property consequently vests in the purchaser, who has his remedy upon the contract of warranty, either express or implied, by way of abatement in the price, when sued upon the notes, or by a direct suit upon the warranty.

As to the second charge: When considered with reference to the proof, we feel satisfied it was calculated to mislead, and to induce the jury to underrate and disparage the testimony of the physicians. Several of them, from actual exam-

ination, deposed to the *fact*, that the slaves had certain diseases—syphilis, gonorrhea, umbilical hernia, &c.—and described the presence of the symptoms which attend these diseases. When, therefore, the court told the jury, "that the testimony of physicians was matter of opinion merely," without discriminating between that portion of their proof which went to facts, and that which was really but matter of opinion, the jury might well have been induced to conclude their whole evidence should be treated as matter of opinion merely; they were at least liable more readily to confound the evidence of facts with that of mere opinion, and thereby to prejudice the appellant. That the opinion of medical gentlemen, as to the length of time a disease may have existed, from the symptoms then present, is not equal to positive proof of the *fact* of its existence, is certainly true. The symptoms may, and doubtless often do, mislead them; and hence such conclusions are mere matter of opinion. This was probably the meaning the judge intended should be given to the charge in question; but the language employed justifies a very different conclusion. He was charging, of course, with reference to the proof in the cause, and the jury are told, not that the opinion of the physicians who had deposed should be regarded by them as matter of opinion, as contradistinguished from direct or positive proof of facts, but that the testimony of physicians—that is, the evidence which the physicians in this case had furnished—"was matter of opinion merely." Such charge manifestly tended to mislead, and was erroneous as an abstract proposition, and injurious to appellant in its practical bearing upon the case.

We see no objection to the proof made by Quartemus, that when he saw the slave, Mary Jane, "she *appeared* to be healthy." The *apparent* condition of the physical system, as to health or sickness, is certainly matter of fact. If the opposite side desired to ascertain what the appearances were which the witness denominated healthy, they should have elicited such proof upon the cross-examination.

What we have said disposes of the several points involved in the charges. We have but to add, that the judgment must be reversed, and the cause remanded.

JONES *vs.* COWLES ET AL.

1. When the equity of a bill rests upon the existence of a particular fact, that fact must be clearly alleged in the bill: an allegation that complainant "is advised and believes," is not sufficient.
2. A bill was filed, setting up an equitable estoppel, to perpetually enjoin the defendant from asserting his legal title to a tract of land which he had verbally sold to one W., who sold to S., who sold to complainant. It alleged, that W. agreed to sell to S. if defendant would sanction the sale and recognize his verbal contract, and that they together called on him to ascertain whether he would do so; that defendant replied, that he did recognize the validity of his contract, that he was willing that W. might sell to S., and that he would look to the former for the payment of his purchase money. The answer admitted these facts, but denied that defendant thereby intended to surrender his right to look to the land as a security for the purchase money, or to do more than recognize the validity of his verbal contract: *Held*, that the injunction was properly dissolved on the coming in of this answer, as the facts admitted by it were not sufficient to create an estoppel.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Moses Jones against Thomas M. Cowles, Robert J. Ware, and Arnold Seales, setting up an equitable estoppel against said Cowles, and praying that he might be perpetually enjoined from the further prosecution of a suit at law for the recovery of a certain tract of land, which he had sold by parol to said Ware, who sold to said Seales, who sold to complainant. The allegations of the bill and answer are stated at sufficient length in the opinion of the court. On the coming in of the answer, a motion was made to dissolve the injunction, and to dismiss the bill for want of equity; and both these motions were sustained by the chancellor, whose decree in that behalf is now assigned for error.

GEO. W. GUNN, for the appellant, contended,—

1. That the allegations of the bill were sufficient; that it is only necessary, in chancery pleading, to allege the facts upon which the relief is sought, and though that proof may consist of admissions, it is not required to allege in the bill

that such admissions were made.—Brandon v. Cabiness, 10 Ala. 156; M. & C. P. Railroad Co. v. Toulmin, 15 *ib.* 472; Bishop v. Bishop, 13 *ib.* 475; Owen v. Moore, 14 *ib.* 640; Holman v. Bank of Norfolk, 12 *ib.* 369; Calhoun v. Cozens, 3 *ib.* 498; Hogan v. Decatur Branch Bank, 10 *ib.* 486; Read v. Walker, 18 *ib.* 329; Lanier v. Hill, 25 *ib.* 554.

2. That the admissions of the answer made out a clear case of equitable estoppel against Jones, and therefore the injunction ought not to have been dissolved.—Brown v. Wheeler, 17 Conn. 345; 4 Comyn's Digest, tit. Estoppel, p. 200; Co. Litt. 352 a (1); Robertson v. McNeill, 12 Wend. 578; 6 Pick. 148; 17 Serg. & R. 364; McCrarey's Executors v. Remson, 19 Ala. R. 430; Pool v. Harrison, 16 *ib.* 167; McPherson v. Walters, 18 *ib.* 715; Moore v. Levert, 24 *ib.* 310; Steele v. Adams, 21 *ib.* 534; Bear v. Welsh, 17 *ib.* 770; Center v. P. & M. Bank, 22 *ib.* 743; Stone v. Britton, *ib.* 543; Rowland v. Day, 17 *ib.* 683; Burns v. Taylor, 23 *ib.* 255; Young v. Wood, 11 B. Mon. 128.

N. W. Cocke, *contra*, insisted, that there was no equity in the bill, and for that reason the injunction was properly dissolved; that the only issue presented by the allegations of the bill, was whether complainant "is advised and believes" that the facts existed on which he relied, and this was insufficient (Read v. Walker, 18 Ala. 332; McDowell v. Graham, 3 Dana 73; Spence v. Duren, 3 Ala. 253); that the other allegations of the bill were too vague and uncertain to entitle complainant to relief; and that the facts admitted by the answer did not constitute an estoppel *in pais* (Ware v. Cowles, 24 Ala. 446).

GOLDTHWAITE, J.—The object of the bill is, to prevent Cowles from asserting his legal title to certain lands (which, it is alleged, he sold to Robert J. Ware, and which were sold by him to Arnold Seales, and by Seales to the complainant Jones) on the ground, that he has placed himself in a position which, in equity, estops him from the assertion of such title against the appellant, Jones.

The charge is, that Seales purchased of Ware certain lands, including the lands subsequently sold to the complainant, for

the sum of four thousand dollars, for which he gave his notes and received a bond for titles from Ware. The bill then proceeds:—"Your orator further saith, that he is advised and believes, that before the said contract of purchase was consummated, that the said Thomas M. Cowles, in whom was the legal title, as your orator is informed, said to the said Arnold Seales and Robert J. Ware, that the said Ware might sell the said lands to the said Seales, and that he (the said Cowles) would look to the said Ware for the payment of the same; and that the said Cowles, in fact, stood by and gave his assent, as he believes, to the sale of said lands by the said Ware to the said Seales, he having been advised at the time that a contract had been agreed upon, which was to become effectual if he (Cowles) should approve or sanction the sale, which he did do." The bill then states, that Seales was induced, by the statement made by Cowles, to enter upon and purchase the land; that Seales sold to complainant, who made the purchase, and valuable improvements, on the faith of the assent of Cowles to the sale by Ware. It will be seen from the statement we have made of the bill, that the equity of the appellant rests entirely upon the conduct of Cowles in giving his assent to the sale by Ware to Seales; and hence it is necessary that that fact should be clearly charged in the bill. But the bill is defective in this, as the fact of the assent is not charged at all. The allegation, as will be seen from the extract we have made, simply is, that the complainant was advised and believed that such assent had been given, and this is not enough.—Read v. Walker, 18 Ala. 323, 332; McDowell v. Graham, 3 Dana 73. If the allegation we have referred to is struck out, there is no other which would create any estoppel on the part of Cowles.

But if the fact which we suppose was intended to be charged had been alleged with sufficient certainty, we think the injunction was properly dissolved on the answer of Cowles. In this aspect, the facts out of which the supposed equity of the appellant arises, are, that there was a contract between Ware and Seales for the sale of the land, which was to become effectual if Cowles, who had the legal title, should approve and sanction the sale; that Cowles, on being advised of the contract, gave his assent to the sale, and said that he

would look to Ware for the purchase money; and that Seales and the appellant acted upon the assent thus given and the statement thus made. Cowles, in answering in relation to this matter, states, that in the fall of 1849, he had agreed verbally to sell the land to Ware for twelve hundred and fifty dollars, one half to be paid on the first of January, 1850, and the other half in January, 1851; and that afterwards, Seales being in treaty for the purchase of the land from Ware, they called on him, and inquired if he recognized the validity of the verbal contract,—considered it a binding one, and was willing that Ware should sell the land to Seales; and that he replied, that he did recognize the validity of the verbal contract, regarded it as a binding one, was willing that Ware should sell the land to Seales, and that he would look to the former for the purchase money; and he denies, expressly, that he, on any other occasion, made use of such language, or that he thereby intended to surrender any right to look to the land as a security for the purchase money due to him from Ware, or that it was his intention to do more than recognize the validity of the verbal sale made by him to Ware. Taking the answer of Cowles as true in relation to this matter, to which it is in response, the case is brought directly within the influence of Ware v. Cowles, 24 Ala. 446. Cowles had the right to look to Ware, as well as to the land, for the payment of the purchase money; and unless it clearly appeared from his statements that he intended to relinquish his lien upon the land, no one had a right to give that interpretation to them. The law will not create an estoppel by argument or inference. The sanction of the sale by Ware we regard as amounting to no more than the recognition of his verbal contract. It was the same as if he had said, I have sold to Ware, keeping the title in myself, and he may sell to whom he pleases. We say that this was the effect, because Seales knew that Cowles retained the title. Surely there was nothing in this from which it could reasonably be inferred that Cowles intended to part with his lien. But he went further, and said that he would look to Ware for the purchase money. Taking all the circumstances into consideration, we cannot say, with any certainty, that by this he meant that he would look to Ware alone. We should rather suppose, that

his meaning was, that although the sale was a verbal one merely, yet he recognized it as binding, and should look to Ware, to whom he had sold, to pay the purchase money.—This, we think, is a more reasonable inference, than to suppose he intended, without any inducement, to give up a substantial right. The law forbids us, in doubtful cases, to give such a construction to language in order to raise an estoppel.

Judgment affirmed.

McLAREN, RAGAN & Co. *vs.* BRADFORD.

1. Neither case nor assumpsit can be maintained to recover damages for the breach of defendant's duty and contract in not permitting plaintiff to cut and carry away timber, when the declaration shows that the injury complained of resulted from plaintiff's being enjoined and restrained by proceedings in chancery instituted by defendant: the only remedy is, an action on the injunction bond, if there is a breach of it, or an action on the case averring malice.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. NAT. COOK.

TRESPASS ON THE CASE by McLaren, Ragan & Co., late partners and proprietors of a steam saw-mill, against Joseph W. Bradford, to recover damages sustained by plaintiffs by reason of defendant's violation and breach of his written contract, dated Macon county, June 11, 1847, of which the following is a copy:

"I hereby sell to McLaren, Ragan & Co. all the timber owned by me, suitable for saw logs, on the place on which I now live, being three hundred and twenty acres, not including what is now under fence, in consideration of a note of seventy-five dollars, of this date given to me by them."

"Joseph Bradford."

The declaration set out this agreement, and averred, that the said defendant thereby also intended to grant to the plaintiffs the right and privilege, without let, hindrance, or mo-

lestation, of cutting and carrying away said timber from said land, and all other rights and privileges incident and necessary to the full use and enjoyment thereof; that the said defendant, not regarding his said contract, but contriving &c. to injure plaintiffs in that behalf, did not, nor ever would, in accordance with the tenor and effect and necessary import of said contract, suffer or permit said plaintiffs to cut and carry away all the timber on said land suitable for saw logs, and for sawing up into lumber, but, on the contrary, afterwards, and before said plaintiffs had cut and carried away all of said timber suitable for sawing up into lumber, to-wit, on the 11th November, 1847, exhibited his bill in chancery, and procured an injunction, restraining and enjoining said plaintiffs until the November term, 1850, of said court, (when said injunction was dissolved, and said bill was dismissed,) from cutting down, or carrying away from said land, any other timber than such large heart-pine trees as were suitable for sawing up into rail-road railing, or string pieces; and plaintiffs aver, that by reason of the premises they were wrongfully deprived of the use, benefit, and advantage of sawing up into lumber twenty-five hundred trees, then and there standing on said land, and which were of great value, &c.; and in consequence thereof said trees were wholly lost to plaintiffs; to their damage, &c.

The court sustained a demurrer to the declaration, and this is now assigned for error.

N. W. Cocke and James E. Belser, for appellants, contended that the declaration was sufficient, and cited Myers v. Gilbert, 18 Ala. 469.

Clopton & Ligon, *contra*, contended, 1st, that the procuring of the injunction was no legal breach or violation of defendant's contract; that a resort to the courts of the country, whenever their aid is deemed necessary, is the right of every citizen; and that for the abuse of this right by defendant, plaintiffs had two remedies—an action on the injunction bond, and an action on the case for the damages which they had sustained.—Marshall v. Betner, 19 Ala. 347.

2. That if the injury complained of would support an action

on the contract, then the declaration must aver malice, and negative the ground on which the injunction was sued out.—Spivey v. McGehee, 21 Ala. 420; 1 Bac. Abr. 142; Tiller v. Shearer, 20 Ala. 527.

CHILTON, C. J.—Whether this declaration be considered as in an action *ex contractu*, or *ex delicto*—whether in *assumpsit*, for the breach of the written contract made by Bradford, or in *case*, for a tortious breach of duty growing out of such contract—we are of opinion, that in neither aspect can it be supported.

Although it contains a general averment, that the defendant did not, nor would, ever suffer and permit the plaintiffs to cut and carry away all the timber, &c., yet the plaintiffs go on to particularize how they were prevented, and, upon a fair construction of their pleading, clearly show, that the injury complained of resulted from their being enjoined and restrained by proceedings in chancery instituted by Bradford. The injury consequent upon the writ of injunction is the *gist* of this action, and this injury is the immediate result of civil proceedings instituted in the chancery court.

The law secures to every citizen the right to resort, *bona fide*, to the courts of justice, to invoke their aid in protecting him in the enjoyment of his property. If they do this without malice, they are not liable by the rules of the common law; and to hold them liable in this State for the mere wrongful resort to civil or criminal proceedings, in the absence of malice, requires some statutory provision, such, for example, as relates to suing out attachments wrongfully, and the like. So, also, where an action is brought on an injunction bond conditioned to pay damages consequent upon the wrongful exhibition of a bill in chancery and obtaining an injunction, we have held, that the actual damage may be recovered, although there was no malice.—Spivey v. McGehee, 21 Ala. 417; 19 Ala. 344.

The case before us is not in tort for the malicious prosecution. No malice is averred; nor is it upon the injunction bond; these being the only remedies which the law affords the party injured by the injunction. But the effort is to transfer the injury, which is the immediate result of the injunction, to the contract, making it work the breach of such

contract, which contains no provision that could be violated by a *bona fide* resort to the civil proceedings complained of. We know of no rule of law which justifies this. If the party has been injured by the chancery proceedings, the law gives him a remedy, as we have said, either upon the injunction bond, if there be a breach of it, or an action upon the case, if there be malice. To one of these remedies he must resort, and not to his contract, the operation of which has been incidentally affected by such civil proceedings.

Let the judgment be affirmed.

SAVAGE & DARRINGTON *vs.* WALSHE & EMANUEL.

1. Where a statute affects a community, and requires as a condition to its validity that something should be done before it goes into operation, the act has no force or effect until the thing required to be done is performed; but where a statute affects only one or more designated persons, either natural or artificial, those interested in its object may dispense with a preliminary of this character, and claim the benefit of its provisions, without requiring the performance of the condition.
2. The object of the act of February 12, 1843, "for the final settlement of the affairs of the Planters and Merchants' Bank of Mobile", was to obtain a dissolution of the Bank's charter agreeably to law; and although it provides for the institution of judicial proceedings against the Bank to obtain a judgment of forfeiture of its charter, and declares "that if no cause of forfeiture shall be found, this act shall have no force or validity," yet the Bank might dispense with the judicial proceeding by surrendering its charter and accepting the provisions of the act, and it was competent for the State, with the assent of the Bank, to resume its franchises at any time.
3. In a suit brought by a purchaser of negotiable paper at a sale of the Bank's assets, made by its trustees under the act of 1850, an allegation in the declaration that the charter was surrendered, but was continued by virtue of the provisions of the several acts for the settlement of the Bank's affairs, is not repugnant or contradictory, when construed with reference to those acts.
4. The fact that a note, taken by the trustees after the surrender of the Bank's charter, was made "negotiable and payable at said Bank", does not raise a legal presumption that it was discounted, instead of being taken in settlement of a debt due.
5. The power of sale conferred upon the trustees by the act of 1850 gave them, by necessary implication, the authority to transfer negotiable securities so

as to pass the legal title to the purchaser by their assignment, and enable him to sue in his own name.

6. The clause in the second section of the act of 1850, which requires the trustees to sell the remaining property and assets of the Bank "within thirty days from the first Monday in November next", is not mandatory, but directory merely; and therefore, a sale made after the expiration of the time specified is sufficient to pass a good title to the purchaser.

7. A plea, averring "that the charter of the Bank was not forfeited, and its corporate existence was not dissolved", is fatally defective on demurrer: the first allegation is no answer to the declaration, which alleges that "the charter was surrendered to the State," and the second is an allegation of matter of law.

8. So, a plea, averring that the trustees "were not invested with the legal ownership and control of said note, and did not make a legal transfer and endorsement of the same to the plaintiffs", is but the allegation of a legal conclusion instead of facts, and therefore demurrable.

9. The same objection applies to a plea which avers "that said Bank, at the date of said note, had no power or authority to make a contract, and that said note is null and void."

10. The genuineness of an endorsement of the note sued on can only be denied by a sworn plea.

11. The objection that an endorsement of the note sued on was read in evidence, "when it was not shown to have been made at the time alleged in the declaration", is not a reversible error, when the record shows that such proof was subsequently made.

12. Where defendants by his plea puts himself upon one issue, he thereby admits all the rest.

13. The rendition of judgment against a defendant who was not served with process, and who did not appear, is a mere clerical mistake, which may be amended on motion in the court below, and the judgment must be regarded as affecting those defendants only who were before the court; and if no motion to amend is made, the mistake furnishes no ground of reversal.

APPEAL from the Circuit Court of Clarke.

Tried before the Hon. LYMAN GIBBONS.

ASSUMPSIT by Jonathan Emanuel and Charles Walshe, as assignees of Sidney Smith and David Stodder, trustees of the Planters and Merchants' Bank of Mobile, against John B. Savage, John Darrington and James Savage, on a promissory note, of which, with the endorsement thereon, the following is a copy:

"Macon, May 10, 1847.

"$3468 23. Twelve months after date, we, John B. Savage, John Darrington and James Savage, jointly and severally promise to pay the Planters and Merchants' Bank of Mobile, or order, three thousand, four hundred and sixty-eight 23-100

dollars, value received; negotiable and payable at said Bank."

(Signed by the defendants.)

"For value received, we, David Stodder and Sidney Smith, trustees of the Planters and Merchants' Bank of Mobile, assign, transfer, and deliver this note (without recourse) to Charles Walshe and Jonathan Emanuel."

(Signed by said trustees.)

The suit was commenced on the 2d October, 1851. The declaration, after alleging the execution of the note, proceeds—"And plaintiffs aver, that before and at the time of the execution of said note, said Bank, as a corporation, was dissolved, and its charter surrendered to said State, and its franchise of banking so surrendered; but by virtue of the provisions of the acts of said State, approved the 13th February, 1843, for the final settlement of the affairs of said Bank, and the acts amendatory thereto, said charter was continued, and (by virtue of the provisions of said acts) said trustees were elected and appointed trustees of said Bank, and the said note (by virtue of the provisions of said acts) was transferred to the said trustees, who thereby became the holders and legal owners of said note, for the objects contemplated by said acts; and being such holders and owners, the said trustees on the 21st September, 1851, sold and assigned said note to said plaintiffs, for ready money, in pursuance of the provisions of said acts and said trustees' power under them, by means of which plaintiffs became and are the holders and owners of said note; by means of which defendants became liable to pay plaintiffs said money on request," &c.

The writ was returned "not found" as to John B. Savage. The other two defendants demurred to the declaration, but their demurrer was overruled; and they then pleaded, 1st, that the charter of said Bank was not forfeited, and its corporate existence was not dissolved, as alleged in the declaration"; 2d, "that said Stodder and Smith were not, at the time and in the manner set forth in the declaration, trustees of the said Bank"; 3d, "that the said Stodder and Smith were not, on the 21st day of September, 1851, or at any other time, invested with the legal ownership and control of said note, and they did not make a legal transfer and endorsement of the

same to the plaintiffs"; 4th, "that the endorsement of the said trustees is null and void"; 5th, "that the said Bank, at the date of the said note, had no power or authority to make a contract, and that the said note is null and void."

The plaintiffs demurred to the first, third, and fifth pleas, and their demurrer was sustained; and issue was joined on the second and fourth pleas. The jury returned a verdict for the plaintiffs, and judgment was thereon rendered against all the defendants.

On the trial, as appears from the defendants' bill of exceptions, the plaintiffs read in evidence to the jury the note sued on, with the endorsement thereon; "and the defendants objected to this endorsement, because it was not shown that it was made at the time alleged in the declaration, and because no proof was made of the genuineness of the signatures of Smith and Stodder; but the objection was overruled, and the transfer was read in evidence, to which the defendants excepted."

"The plaintiffs then introduced evidence, tending to show that Sidney Smith and David Stodder were legally elected and appointed trustees of said Bank, according to the terms of the act of 1845; that they accepted the trust, gave bond, and were qualified, as the act directed; that the note sued on was sold by said trustees, for cash, to Charles Walshe, on or about the 21st September, 1851, according to the provisions of the act of February 12, 1850; that said Smith and Stodder then executed the transfer endorsed on the back of the note, on the 21st September, 1851, or about that time; that for some time previous to said transfer and sale, at that time, and subsequently, said Smith and Stodder were the acting trustees of said Bank. It was further shown, that a settlement was made with the defendants to this suit on the day the note bears date, and they gave the note on which suit is brought, and, on the same day they gave the note, a credit for $380 was endorsed on the note. The plaintiffs offered no further evidence, and the defendants introduced no evidence whatever.

"The defendants asked the following charges:

"1. That proof must be adduced that the charter of the Bank was declared forfeited by judgment of the Circuit Court of Mobile county, according to the provisions of the act of 1843.

"2. That the trustees had no power to assign and transfer the note sued on, so as to enable the assignees to sue in their own name.

"3. That if the note sued on was made payable to the Bank after the forfeiture of its charter, it is void for want of power on the part of the Bank to make a contract, unless the plaintiffs show that the note was made in compounding a bad or doubtful debt.

"4. That if the note sued on was made payable to the Planters and Merchants' Bank after the forfeiture of its charter, it must be shown by the plaintiffs that the note was given in liquidation or extension of a previous existing debt due the Bank, before they can recover in this suit."

The court refused each one of these charges, and the defendants excepted to each refusal; and they now assign for error—

"1. The rendition of judgment against John B. Savage, upon whom process had not been served, and who was not before the court by attorney or otherwise.

"2. The overruling of the demurrer to the declaration.

"3. The sustaining of the demurrer to the first, third, and fifth pleas.

"4. The several rulings of the court set forth in the bill of exceptions."

R. C. TORREY, for the appellants:

I. The process was returned "not found" as to John B. Savage, and no appearance was ever entered against him; yet the plaintiffs did not discontinue as to him, but declared against him, and entered up judgment against him. This was error. Williams v. Lewis, 2 Stew. 41; Gilbert v. Lane, 3 Port. 267; Graham & Christian v. Roberds, 7 Ala. 719.

II. The demurrer to the declaration should have been sustained—

1. Because it did not allege that a judgment of forfeiture had been rendered against the Bank. The acts of 1843 and 1845 are public statutes, and may be considered a part of the declaration. The first act provides for a forfeiture of the Bank's charter, and a renunciation of its banking privileges, *provided*, upon a judicial inquiry, certain alleged facts shall be

found to exist; "and after rendition of judgment by the court upon said information, in favor of the State, all the provisions of this act shall have full force and effect"; but, "if no cause of forfeiture shall be found, this act shall have no force or validity." Now the action of the court upon the information directed by this act to be filed, is a matter of which the courts cannot take judicial notice: and as the act did not go into operation until the issue so directed to be made had been found in favor of the State, it was necessary that the action of the court should be alleged in the declaration.

2. Because it described the Bank's charter as forfeited prior to the execution of the note, and alleged the note to have been made payable and negotiable at the Bank; and from this it may be fairly inferred that it was discounted at the Bank for profit, which would be contrary to the acts cited, and would render the contract void.—Saltmarsh v. Planters and Merchants' Bank, 14 Ala. 668; same case, 17 *ib.* 761.

3. Because it was too uncertain and contradictory to present a fair issue. It alleged that the charter was forfeited and surrendered to the State by the acts of 1843 and 1845, and at the same time that the charter was continued by force of the same acts; thus presenting to the defendants two issues —that the charter was forfeited by those acts, and that it was not forfeited.

4. Because the endorsement gave the plaintiffs no right to sue in their own names as assignees of the trustees. The acts cited declare that the corporate name of the Bank may be continued and used in the collection of its debts. The case of Jemison v. Planters and Merchants' Bank, 17 Ala., clearly shows that, previous to the sale, the suit should be brought in the name of the Bank by its trustees, and that the declaration should show the character in which they sue. The act of 1850, by virtue of which the trustees sold the assets of the Bank, is entirely silent as to the manner in which the purchasers might sue on the notes sold. As the trustees could not sue in their own names, they could not by their endorsement convey to the purchasers a right (which they themselves did not possess) to sue in their own names. If the trustees' endorsement only conveyed the right which they had, it was the right to use the name of the Bank, and the suit should have

been brought in its name. On this point, see Camack v. Ridgway, 18 Ala. 286, and Crawford v. P. & M. Bank, 6 *ib.* 290.

5. Because it alleges that the trustees sold the note, by virtue of the act of February 12, 1850, on the 21st day of September, 1851; while the act referred to declares, that the trustees shall sell "within *thirty days* after the first Monday of September, 1850." The object of the act was, to provide for the speedy settlement of all the outstanding business of the Bank, and to make a final close of the whole concern. If the trustees, in defiance or disregard of the statute, might (as they did in this instance) delay the sale for ten months after the expiration of the limited time, they had an equal right to delay for ten years. What then becomes of the act? It is of no effect: it is a mere recommendation, which the trustees may regard or not as suits their pleasure. That the act is mandatory in this respect, see Commercial Bank of Natchez v. Chambers, 8 S. & M. 9; 2 Sup. U. S. Digest, p. 808, §§ 29 to 31.

III. The first plea was good, and the demurrer to it should have been overruled. It traverses a material allegation of the declaration. The plaintiffs claim through the acts of forfeiture, and may well be held to prove what they have alleged.

IV. The third plea is good. The plaintiffs claim through the endorsement and transfer of Stodder and Smith as trustees. If Stodder and Smith never were such trustees, or never made a valid transfer or endorsement, then plaintiffs' title fails. This allegation, therefore, defendants might properly traverse, and their plea is good.

V. The fifth plea, which alleges that the note is null and void, is good. The defendants had a right to show that the note was purchased or discounted by the Bank in the way of business, and with a view to profit, and was therefore void, as the Bank had no authority to do such acts.—Cases of Saltmarsh and Jemison, *supra*.

VI. The charges asked raise the same questions which are presented by the demurrer to the declaration.

F. S. Blount, *contra*:

1. The judgment rendered affects only the parties who have been served with process. If erroneous, it will be amended

in this court at the costs of the appellants.—Clay's Digest, p. 332, § 54; *ib.* 361, § 62; Graham & Christian v. Roberds, 7 Ala. 719; Del Barco v. Br. Bank at Mobile, 12 *ib.* 238.

2. The declaration presents a substantial cause of action, and the demurrer thereto was properly overruled.

3. The first, third, and fifth pleas, to which demurrers were sustained, tendered immaterial issues. The plaintiffs were not required to reply to them, as the declaration would have been good, if all the matters questioned by them had been stricken out.

4. The objection to the endorsement, that it was not made at the time alleged in the declaration, is not tenable. It was an unnecessary allegation, and might be treated as surplusage. It was sufficient, if put in issue, to show that the endorsement was made before suit brought. The evidence shows that it was made on or about the 21st September, 1851, the day alleged in the declaration.

5. The genuineness of the endorsement could only be put in issue by the plea of *non est factum*, or other plea setting out the special matter, verified by affidavit; otherwise, it is demurrable.—Cummings v. Mason, 9 Port. 309. The proof set out shows that Stodder and Smith executed the transfer.

6. The charges asked were properly refused. If the Bank surrendered its charter, and went into liquidation, it was sufficient to invest the trustees with the right to assign and transfer the assets. The possession of the note by the trustees was evidence of their acceptance of the trust, and of the surrender of the charter. These charges are based on the idea, that the acts cited declared all contracts made by the Bank after the forfeiture of its charter absolutely void. But this, as appellants concede, was only consequent upon the forfeiture of the charter, and its charter never has been forfeited: the judgment of forfeiture rendered on the 24th February, 1843, by the Circuit Court of Mobile, was reversed by the Supreme Court, at its June term, 1847, and the cause was not remanded.—The State v. P. & M. Bank, 12 Ala. 547. No other proceedings were had under the act of 1843, and no forfeiture of the charter has been judicially declared. By non-user, and the acceptance of the terms of the act for the settlement of its affairs, the surrender of the charter may be

presumed; yet the appellants in this suit cannot enforce or take advantage of a cause of forfeiture: the government alone, which created the corporation, can institute such a proceeding, since it may waive a breach of the contract.—Angell & Ames on Corporations, p. 664. The fact is, however, that this note was taken "on a settlement made with the defendants on the day the note bears date, and they gave the note on which suit is brought."

7. The suit is properly brought, and the declaration shows how the title was derived. The act of 1850, in authorizing the trustees to sell the assets of the Bank, invested the purchasers of its negotiable paper with the same title, and legal rights flowing therefrom, that would have attached to the purchase of negotiable paper from any other party; the power to endorse, transfer, or assign, was a necessary incident to the power to sell. The cases of Saltmarsh and Jemison, (17 Ala. 754, 761,) cited by appellants, were decided before the passage of the act of 1850. The plaintiffs do not sue for the use of the Bank, but in their own right as endorsees for valuable consideration, and it is only necessary for them to show a legal right derived from the Bank. This can only be done through the trustees, acting as such in behalf of the Bank. The endorsement on the note shows the character in which it was done, and is a literal compliance with the eighth section of the act of 1845.

8. The declaration nowhere alleges that the charter was "*forfeited*:" "*surrendered*" is the only word used; and consequently it presents no issue as to the forfeiture of the charter.

GOLDTHWAITE, J.—The first question presented on the record, is, as to the sufficiency of the declaration.—The action is brought by the appellees, as the assignees of Sidney Smith and Daniel Stodder, trustees of the Planters and Merchants' Bank, a late corporation; and describes the note sued on, as dated in May, 1847, and negotiable and payable at said Bank. It further alleges, that before the execution of the note, the corporation was dissolved, and its charter and franchise of banking surrendered to the State, but by virtue of the provisions of the statute of 1843, and the acts amendatory thereto, the charter was continued, and the trus-

tees named elected and appointed; and that they, on the 21st September, 1851, sold and assigned the note to the plaintiffs.

In determining the question on the demurrer, it is necessary to refer to the various acts which have been passed by the Legislature bearing upon the points involved, with the view of ascertaining whether the facts alleged were sufficient to constitute a legal liability on the part of the defendants. The act of 13th February, 1843, (Acts 1842-3, p. 70,) provides for the final settlement of the affairs of the Bank by commissioners, and confers upon them the authority to take into possession the *choses in action* and other property. It provides for the sale of the real property, and the collection and extension of the debts, and authorizes the use of the corporate name of the Bank in the collection of debts, and for the purpose of maintaining suit. It also provides for judicial proceedings to be instituted against the Bank, with the view to a forfeiture of its charter, and declares, that upon a rendition of judgment in favor of the State in such proceeding, the other provisions of the act are to have full force and effect; and it also declares, "that if no cause of forfeiture shall be found, this act shall have no force or validity." On the 24th January, 1845, (Acts 1844-5, p. 46,) an amendatory act was passed, which, amongst other things, provided for the election of two trustees by the stockholders—made it the duty of the commissioners to pay over and deliver to them all moneys, *choses in action*, &c., except the amount necessary to pay the outstanding claims against the Bank; and also gives to the trustees the authority to use the name of the Bank in the collection of its debts, in the same manner as if the charter had never been forfeited. And finally, on the 12th February, 1850, (Acts 1849-50, p. 125,) another act was passed, which, by its second section, provides "that within thirty days after the first Monday in November next, the said trustees shall sell, for cash, all remaining property, claims, rights and assets belonging to said bank fund, and realize the same for the purpose of final settlement."

We have given the substance of such portions of the several acts as have any bearing upon the points involved; and the first question, which meets us upon the threshold, and which has been strongly pressed upon us by the counsel for appel-

lants, is, whether the validity of the several acts to which we have referred is not dependent upon a judgment of forfeiture being first had against the Bank, which (it is evident) was contemplated under the act of 1843, and without which, as the proviso of the first section declares, the act is to be of no validity. If the several acts are nugatory and void without such a judgment, then it is evident that the declaration is defective, for it does not aver the rendition of any judgment of forfeiture, and without an averment to that effect, the courts could not take judicial notice of it, if it existed. It is clear, however, that the only object which the Legislature could have had, in requiring a judicial proceeding to be instituted against the Bank, was to obtain a dissolution of its charter agreeably to law; and it is equally certain that it was competent for the State, at any time, with the assent of the corporation, to resume its franchises, and provide for the winding up of its affairs. In construing the act of 1843 and the subsequent acts, we must regard them as affecting the corporation alone, and viewed in this light, we are of opinion that the requisition on the State to obtain a judgment of forfeiture might be dispensed with by the Bank; that the result, which it was the sole object of the Legislature to accomplish by the judgment of forfeiture, could as well be attained by a voluntary surrender by the Bank of its franchise, and that the proviso was not intended to affect the validity of the act if its terms were accepted by the corporation. We concede, that where a statute affects a community, and requires, as a condition to its validity, that something should be done before it goes into operation, in such a case the act has no force or effect until the thing required to be done is performed. But where the statute affects but one or more designated persons, it matters not whether they are natural or artificial, those interested in the object of the act may always dispense with a preliminary of this character, and claim the benefit of its provisions, without requiring the performance of a condition which can affect themselves alone. A statutory enactment may be waived by the party entitled to the benefit of it (Williams v. Potter, 2 Barb. Sup. Ct. R. 316); and precisely upon the same principle, the Bank could dispense with the judicial proceeding, by a surrender of its charter, and as-

senting to the provisions of the act. The declaration, as we have seen, contains an averment that the corporation surrendered its charter to the State, as well as an allegation that the note sued on was transferred by the operation of the act of 1843, and the other acts amendatory thereto, to the trustees elected and appointed under those acts, which is equivalent to an acceptance of their provisions by the corporation, which would, of itself, operate as a surrender of its franchises (Ang. on Cor. 658, and cases there cited); and as the Bank had the right to dispense with the judicial procedure required by the act of 1843, by placing itself in the same condition in which a judgment of forfeiture would have placed it, an allegation which shows they did this, and that they assented to the several acts referred to, dispensed with the necessity of any averment that a judgment of forfeiture had been rendered.

It is urged on the part of the appellants, that the averment that the charter was continued by the acts referred to, is repugnant to the previous allegation of the surrender of its franchises by the corporation. But, construed with reference to those acts, we understand it to mean simply, that although the charter was surrendered, the corporation was not, *ipso facto*, dissolved, but its existence was continued by operation of law, for the purpose of settling its affairs according to the provisions of the statutes.

It is also urged, that as the note described in the declaration was made negotiable and payable at the Bank, the legal presumption is, that it was discounted, instead of having been taken in settlement of a debt due, and that neither the Bank, nor its commissioners or trustees, after the surrender of its charter, had the authority to discount paper. This position cannot be sustained. The form in which the note was taken is usual and customary in mercantile transactions, and affords no evidence whatever that it was not taken under the power conferred by law upon the trustees.

Another ground of demurrer, strongly pressed, is, that the trustees had no power to invest the purchaser, by their assignment, with the right to sue upon the note in his own name. We deem it unnecessary to inquire whether the legal title to the choses in action of the Bank was vested in the

commissioners or trustees by the acts of 1843 and 1845, giving them the authority to use the name of the corporation in suits if they thought proper; or whether it remained in the Bank, which was by the operation of these acts kept alive for that purpose. By the act of 1850, the trustees are authorized to sell all the claims of the Bank—a power which was not conferred upon them under any of the previous acts; and this power, we think, by necessary implication, conferred upon them the authority to transfer negotiable securities so as to pass the legal title to the purchaser by their assignment. If they were invested with the legal title under former acts, the proposition is too plain for argument, while, if the existence of the Bank was prolonged for the purpose of preserving the title in it, acting for it *pro hac vice*, and for the parties in interest, we must regard them, under the last act, as having the authority to transfer by their assignment to the purchaser the legal title.

The only remaining question, upon this branch of the case, is, as to the power of the trustees to sell at the time specified in the declaration, which is September, 1851; and this depends upon the construction to be given to the clause of the second section of the act of 1850, which requires the trustees to sell "within thirty days after the first Monday in November" of that year. If it is mandatory, the sale made at a period beyond the time specified in the statute is void, and the purchaser acquires no title; while on the contrary, if the clause referred to is directory merely, the objection cannot prevail. It is to be observed that the statute does not say that the sale is nugatory for the failure to observe the requisition in regard to time, and this alone is regarded by the courts as a strong ground for construing the words as directory rather than imperative.—Pond v. Negus, 2 Mass. 230; The King v. The Inhabitants of St. Gregory, 2 Ad. & El. 99; Cole v. Green, 6 Man. & Gran. 872. Here there are no words of prohibition to the exercise of the power after the time specified in the statute, but the power itself is of a nature which would not justify the inference that it was intended by the Legislature to operate as a limitation on the authority of the trustees. We all agree that the clause referred to was directory merely.

In the action of the court in sustaining the demurrer to the first, second and fifth pleas, there was no error. The first plea was defective, for the reason, that the averment that the charter of the Bank was not forfeited, is no answer to the declaration which contains no such averment. It is true, that if the plea contained other matter, properly pleaded, sufficient to bar the action, the averment we have noticed might be rejected as mere surplusage: but the objection to the other allegation is, that it is matter of law, rather than of fact.—Gould's Pl., ch. 3, § 12. It is, that the corporation was not dissolved. It does not deny that the charter was surrendered to the State, as is averred in the declaration, but answers the immaterial averment as to the effect of the surrender, which is mere surplusage and matter of law. The same objection applies to the second and fifth pleas, both of which assert legal conclusions instead of facts. Whether a transfer by endorsement, made by the trustees to the plaintiffs below, is legal, or whether the Bank had authority to make a contract at the date of the note, are pure questions of law. Neither was there any error, of which the appellants can claim advantage, in admitting the endorsement of the note in evidence. Its genuineness could, under our decisions, only be impeached by a sworn plea (Bragg v. Nall, 14 Ala. R. 619; Tarver v. Nance, 5 *ib.* 712; Dew v. Garner, 7 Port. 503); and if it were necessary to prove that it was made at the time alleged in the declaration, the bill of exceptions shows that this proof was afterwards made, which, under our decisions, was sufficient.—Lawson v. The State, 20 Ala. 65.

Neither was there any error in the refusal of the court to give the several charges requested by the appellants. The first two simply assert the propositions, that a judgment of forfeiture was necessary to enable the plaintiffs to recover, and that the trustees could not, by their endorsement made upon the sale to the purchasers, confer upon them the right to sue in their own name, each of which we have already considered.

The third and fourth charges were, as we understand them, to the effect, that to enable the plaintiffs to recover, proof must be made, independent of the note, that it was given for a bad or doubtful debt, or in liquidation of a previously existing

debt due to the Bank before its charter was dissolved. Our opinion is, that the note itself is evidence, *prima facie*, that it was lawfully given under the acts of 1843 and 1845; but under the issue presented by the pleadings, the only question of fact for the jury to determine, was, whether the persons named as such in the declaration were the trustees of the Bank. We say this, because the fourth plea presents purely an issue of law arising upon the fact put in issue by the second plea; and it is a well settled rule in pleading, that where a party puts himself on one issue, he admits all the rest.—Cow. & Hill's Notes to Phil. Ev., vol. 3, p. 608, 3 ed. Under the influence of this rule, no other evidence was necessary than that which established the fact that the persons named in the declaration were the trustees under the law.

The only remaining assignment of error is, that the judgment below was rendered against John B. Savage, who, as the record shows, was not served with the process, and who did not appear. The cases of Grayham & Christian v. Roberds, 7 Ala. 719, and Del Barco v. The Br. Bank at Mobile, 12 *ib.* 238, show that upon these facts the judgment must be regarded as not affecting any other persons than those who were before the court, and that the judgment entry as against Jno. B. Savage may properly be regarded as a mere clerical mistake, and that it might have been rectified in the court below under the statute (Clay's Dig. 322, § 55; Code, § 2401); and under the same statutes, as no such motion was made and refused, the cause cannot be reversed on that ground.

Judgment affirmed.

MOORE *vs.* APPLETON.

1. When an agent is employed by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, (as to take personal property, which, although claimed adversely by another, he has reasonable ground to believe belongs to his principal,) the law implies a promise of indemnity by the principal, for such losses and damages as flow directly and immediately from the execution of the agency.

2. On such implied promise, case and assumpsit are equally maintainable; but in either action, the declaration must allege a breach.
3. If the declaration is in case, to recover indemnity from the principal for certain damages recovered in trespass against the agent by the true owner of the property taken, it must negative the existence of any knowledge on the part of the agent, at the time of the taking, that he was committing a trespass, although the *onus* of proving such knowledge may be on the principal.
4. The rule that contribution or indemnity will not be enforced between wrong-doers, does not apply to any case where the act of the agent was not manifestly illegal in itself, and was done in the *bona fide* execution of his agency, and without knowledge (either actual, or implied) that it was illegal.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. THOS. A. WALKER.

TRESPASS ON THE CASE by Claiborne G. Appleton against John Moore, "to recover damages sustained by plaintiff, growing out of certain acts performed by plaintiff, in the capacity of agent for defendant, in the year 1846, in dispossessing and removing one Aaron B. Quinby from a certain tract of land lying in Lawrence county, Alabama, and known as the place on which said defendant now keeps a toll-gate; which act of dispossessing and removing said Quinby was done at the special instance and request of defendant, and while plaintiff was acting as his agent."

The declaration contained two counts; the first alleging, in substance, these facts: That defendant, in 1846, constituted and appointed plaintiff his agent, generally and specially, to do and perform such acts and things as he might request plaintiff to do during the year 1846; that afterwards, and while plaintiff was acting in the capacity of such agent for defendant, and at defendant's special instance and request, and as such agent, "plaintiff took possession of certain goods and chattels, to-wit," &c.; "which goods and chattels, defendant then, and before plaintiff so took possession of them as such agent, stated and represented to plaintiff, were the property of said defendant, and to the possession of which defendant represented to plaintiff that he (defendant) was then entitled, which statements and representations plaintiff then believed and acted on in so taking possession of said goods and chattels;" that afterwards, in March, 1847, one Aaron B. Quinby instituted suit against plaintiff and defen-

dant, in the Circuit Court of Lawrence, to recover damages sustained by him in consequence of the taking possession of said goods and chattels by plaintiff; that after certain proceedings were regularly had in said suit, a judgment was rendered against plaintiff and defendant, in favor of said Quinby's administrator, for $200 damages, besides costs, which amounted to $435 58; that an execution was duly issued on this judgment, on which plaintiff was compelled to pay $325 97; that in addition to this, plaintiff was obliged to pay out large sums of money in defending said suit, attorneys' fees, &c.; whereby plaintiff has been greatly damaged, &c.

The second count, after alleging the agency as above stated, averred that plaintiff, "while acting in the capacity of such agent for defendant, and as such agent, and at defendant's special instance and request, and by his direction, and on his behalf, purchased from one Sarah Quinby certain goods and chattels," &c.; "that afterwards, and after said purchase was made, defendant ratified the same, and proceeded to and did take possession of said goods and chattels;" that Aaron B. Quinby afterwards instituted suit against plaintiff, to recover damages for the taking away of said goods and chattels; that judgment was rendered in said suit, on which execution issued, and plaintiff was compelled to pay, &c.; whereby he has sustained great damage, &c.

The defendant demurred to each count in the declaration, but his demurrer was overruled, and he then pleaded not guilty, with leave to give in evidence any special matter of defence. The defendant also demurred to the plaintiff's evidence, but the court held it sufficient, and judgment was rendered accordingly.

The rulings of the court are now assigned for error.

David P. Lewis, for the appellant:

1. If two persons jointly commit a tort, and the injured party recovers damages, and one of them pays the demand, there is no implied promise in law to contribute by the other. Chitty on Contracts, p. 400 (m.); Black & Manning v. Oliver, 1 Ala. 450; St. John v. St. John's Church, 15 Barb. S. Ct. R. 352; 4 U. S. Digest, p. 67, §§ 214, 215. No express promise is averred in either count of the declaration, and none is shown in the evidence.

2. The second count is demurrable, also, because it shows clearly *par delictum*, in which *potior est conditio defendentis;* or else it shows that both Moore and Appleton were deceived and imposed upon by Sarah Quinby, and that they were equally innocent. If they are equally innocent, then the law will not say which of the two shall suffer.

3. Appleton's trespass was the ground of Quinby's recovery against him, and the proof shows that he knew he was committing a trespass; and no court will lend its aid to a man who founds his suit on an illegal act.—St. John v. St. John's Church, 15 Barb. S. C. R. 352; Chitty on Contracts, p. 570; Merryweather v. Nixan, 8 Term R. 186; 1 Cranch's R. 345; 2 *ib.* 453. The test is, whether the plaintiff relies on such illegal acts, to establish his case.—Chitty on Cont., *supra*; 1 Caines' Cas. 104; 6 Ohio R. 21; 11 Serg. & R. 164; 4 Pick. 314; 11 Wheat. 258; Paley on Agency, p. 62.

4. An express promise by a principal to indemnify his agent against the consequences of an illegal act, is void, unless the agent acted in good faith, not knowing that he was committing a trespass.—15 Barb. S. C. R. 348; 17 Johns. 142; 9 Cowen's R. 155-6; 2 Johns. Cas. 56; 13 E. C. L. R. 343; Story on Agency, pp. 456-8. And an express promise will not bind the principal, if the agent knew the act to be a trespass.—15 Barb. 348; Dunlop's Paley on Agency, p. 152.

5. An agent can claim reimbursement from his principal, for a trespass committed by him at his principal's bidding, *only* when he had no knowledge or suspicion that it was wrong, and acted in perfect good faith.—15 Barb. 348; Adamson v. Jarvis, 4 Bing. 66; Story on Agency, p. 348.

R. W. WALKER, with whom was WM. COOPER, *contra:*

1. The demurrers to the declaration and to the evidence involve the same principles of law, and present the question, whether the facts bring the case within any of the exceptions to the general rule, that the principal is under a legal obligation to indemnify the agent for losses sustained by reason of his employment. An agent, who commits a trespass by direction of his principal, if at the time he had no knowledge that it was a trespass, but acted in good faith, is entitled to reimbursement from his principal for all the damages he sus-

tains.—Story on Agency, § 339; Powell v. Trustees of Newburgh, 19 Johns. 284; Coventry v. Barton, 17 *ib.* 142; Gower v. Emery, 18 Maine R. 79; Avery v. Halsey, 14 Pick. 174; Adamson v. Jarvis, 4 Bing. 66; Barney v. Dewey, 13 Johns. 224; Allare v. Ouland, 2 Johns. Cas. 52; 1 American Lead. Cases, pp. 692-3; Betts v. Gibbons, 2 Ad. & El. 57; Smith's Mercantile Law, p. 110, and cases cited; 8 Term R. 186; 1 Camp. 343; 2 Dow. & C. 288; Bigelow v. Dawson, 6 Cush. Mass. 97; Parsons on Contracts, p. 36, note (x); 2 Car. & P. 417. These cases show that, to deprive the agent of his right to indemnity, *he must know at the time* that it was a wrong. The declaration and evidence both bring this case within the principles settled by these authorities.

2. If the evidence was good under the first count, and sufficient to entitle plaintiff to a recovery under it, then, though the second count were defective, it would be error without injury, the record itself rebutting all presumption of injury; and so, also, if admissible under the second count, and sufficient for a recovery, the appellant takes nothing by showing that the first count is defective.

3. On demurrer to evidence, all reasonable presumptions are made against the party demurring; and the court is not bound to render judgment in conformity with what should have been the verdict of the jury, but with what it legally could have done.—Dearing v. Smith, 4 Ala. 432; Carson v. State Bank, *ib.* 148; 7 Port. 426; 11 Wheat. 171.

RICE, J.—Every man who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for all such acts as the agent does not know to be unlawful, and as would *be lawful* if the employer had the authority he pretends to have.—Adamson v. Jarvis, 4 Bing. 66; Story on Agency, § 339.

Where two persons are claiming title to personal property adversely to each other, and one of these claimants calls upon another person to take it, and the latter has reasonable ground to believe that his employer is the owner of the property, and therefore takes it, without knowing at the time that such taking is a trespass or tort, a promise of indemnity will be implied to such person, although it subsequently turns out

that the title of the employer was not good, and the act of taking a trespass.—Avery v. Halsey, 14 Pick. 174.

In all such cases, a promise of indemnity is implied, upon the plain dictates of reason and natural justice.—Gower v. Emery, 18 Maine R. 79.; Parsons on Con. 36, n. (x).

The promise thus implied extends only to such losses and damages as are direct and immediate, and naturally flow from the execution of the agency. In other words, the agency must be the cause, and not merely the occasion of the losses or damages, to found a just right to reimbursement.—Story on Agency, § 341; Story on Contracts, § 176.

Assumpsit lies upon such implied promises. An action on the case is equally maintainable, and is said to be the more appropriate remedy.—Myers v. Gilbert, 18 Ala. 467; Adamson v. Jarvis, and other cases cited *supra*. But whether the action be assumpsit or case, the declaration is bad, on demurrer, if no breach is stated in it.—1 Chitty's Pl. 337.

When the declaration is in case, as it is here, and shows that the losses for which the agent is seeking indemnity from the principal, are certain damages recovered against the agent for taking property by the direction of the principal, in an action of trespass brought against the agent by the true owner of the property, the declaration is defective, if it omits to state that the taking by the agent was without knowledge on his part, at the time of the taking, that it was a trespass.—The agent must, in his declaration, negative the existence of such knowledge on his part, although the *onus* of proving the existence of such knowledge may be on the principal; for the rule, that the *allegata* and *probata* must correspond, is not of universal application.—Carpenter v. Devon, 6 Ala. 718.

Each count of this declaration is bad, for the omission of a breach, and also for failing to aver that the agent, at the time of the taking, did not know that it was a trespass or tort.

An averment that the principal had notice of the losses and damages sustained by the agent, set forth in the declaration, and failed to pay the same, would be a good breach in such a case as this.

We admit the rule, that the law will not enforce contribution nor indemnity between wrong-doers. But that rule does not apply to any case, where the act of the agent was not

manifestly illegal in itself, and was done *bona fide* in the execution of his agency, and without knowledge (either actual, or implied by law) that it was illegal.—Parsons on Contracts, p. 36, note (x).

That rule is applicable, whenever it appears that the act of the agent was manifestly illegal in itself. For example, if A employ B to assault C, and B thereupon does assault C, and is subjected to damages therefor, B cannot recover such damages from A: the act of B being clearly illegal in itself, the law implies that *he knew* it to be so, and therefore will not enforce his claim to indemnity.

The rule also applies, whenever it appears that, although the act of the agent was not manifestly illegal in itself, yet, in fact, he knew it to be unlawful at the time he did it. For example, if Appleton, *at the time* he took the property claimed by Moore, *knew* that Moore had no just nor lawful right to it, and that Moore's claim was groundless and iniquitous, and that it really belonged to some other person, such *knowledge* on the part of Appleton at the time of the taking, would defeat any recovery by him for any loss resulting from such taking, although he took it as the agent of Moore, and by Moore's direction.—Chappell v. Wysham, 4 Harris & Johns. 560.

For the error of the court below in overruling the demurrers to the several counts of the declaration, its judgment is reversed, and the cause remanded.

WYATT'S ADM'R *vs.* STEELE.

1. A motion to exclude evidence, a part of which is legal, may be overruled, since the court is not authorized to reject that portion which is proper, nor required to sift the evidence so as to separate the legal from the illegal.
2. The construction of an order of sale, made by the orphans' court, is a question for the court, and not for the jury, and must be determined from an inspection of the record alone, without the aid of evidence *aliunde* to show its meaning: similar orders, made by the same judge in other cases, are *res inter alios acta*.

3. The opinion previously pronounced in this cause (23 Ala. R. 764), construing the order of sale of "*perishable property*" as authorizing a sale of slaves, must stand as the law of the case, when remanded to the primary court for another trial, and when brought up again on appeal.
4. If an administrator sells slaves under an order of sale of "the perishable property" of his intestate's estate, the validity of the sale, if it was conducted publicly and according to law, is not affected by his opinion or belief that the order did not authorize him to sell the slaves.
5. If the court, after deciding a question of law against the plaintiff, refuses to instruct the jury, on his request, that they have nothing to do with the decision of that question—thereby impliedly admitting their right to revise its decision—the refusal of the charge gives the plaintiff an additional chance for a verdict, and is, therefore, no cause of reversal in his favor.
6. When the jurisdiction of a court depends upon its ascertainment of a preliminary fact, the exercise of jurisdiction implies the previous ascertainment of the jurisdictional fact, and its decision as to that fact cannot be collaterally called in question; and therefore, where an order of sale is made by the orphans' court, the necessity for the order, being a jurisdictional fact, must be considered as having been made apparent to the court, and cannot be inquired into in a collateral proceeding.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JOHN GILL SHORTER.

DETINUE for a slave named Jeff, by Thomas M. Williams, administrator *de bonis non* of Peter Wyatt, deceased, against David A. Steele; pleas, *non detinet*, and the statute of limitations of six years. On the first trial, the plaintiff had judgment in his favor; but the judgment was reversed on error, and the cause remanded for another trial.—See 23 Ala. 764.

The bill of exceptions in the present record shows these facts:

The plaintiff proved that the slave sued for was the property of the said Peter Wyatt, deceased, both before and at the time of his death, and also the value of the slave and of his hire; and then offered in evidence a transcript from the records of the Orphans' Court of Lowndes county, showing the appointment of Mrs. Mary Ann E. Wyatt and Wm. N. Mock as administrator and administratrix of said decedent's estate in November, 1853, and containing the following orders, made on the same day:

"Ordered by the court, that the administrators of the estate of Peter Wyatt, deceased, have leave to sell all the perishable property of said deceased, upon a credit of at least six months.

"Ordered by the court, that said administrators do make a

true and full inventory of said sale, and return the same to this court the first term thereafter.

"Ordered by the court, that said administrators give a notice of said sale, by advertising at three or more public places in said county, at least thirty days previous thereto, of the time and place of said sale.

"Ordered by the court, that said administrators have leave to sell the present crop of cotton, at public or private sale, as they may deem most advantageous to said estate.

"Ordered by the court, that said administrators do make a full and true return of the proceeds of said sale to this court, at the first term thereafter."

The transcript showed, also, that said administrators at the February term, 1834, returned an inventory to said court, of their proceedings under said order of sale; "whereupon it was ordered by the court, that the clerk enter said appraise bill upon the record, in the inventory book kept for that purpose; ordered further, that the clerk file said original appraise bill in his office as an office document." This inventory shows that eleven slaves were sold by said administrators, one of whom was the boy Jeff.

"Plaintiff then introduced Mrs. Judith Mock as a witness, who testified as follows: That said William N. Mock and Mrs. Wyatt were her children; that William Mock left the State many years since, and that Mrs. Wyatt had married one Armstrong, and had left the State many years ago, carrying with her one of the slaves she had purchased; that on the morning of the sale, and previous thereto, William Mock and Mrs. Wyatt, and one Allen, who was their surety on their administration bond, talked in her presence about their right to sell the negroes; that it was said, the order only covered the perishable property, and the negroes were not advertised,—that they would have to go to Hayneville to get an advertisement, and it would delay time, and that they finally concluded it would make no difference. This conversation was objected to by the defendant, but received by the court, subject to the decision on the final charge. Plaintiff then offered to produce the book of records of said Orphans' Court, containing the orders made by the same judge of the various estates coming under his control; which book contained orders to

sell perishable property, identical with the orders contained in said transcript, and made on the same day of granting letters of administration, and also showed that, in the same estates in which orders had been made to sell perishable property, orders were subsequently made to sell personal property, and that these orders were made both before, about the time, and after said orders were made in said transcript. This book showed that these orders were numerous and uniform, and was offered as evidence to show the practice of said judge in relation to this matter; the said judge being dead. This evidence was objected to, and the objection sustained by the court; and to this the plaintiff excepted.

"Plaintiff then proved, that said negro Jeff was purchased by Mrs. Wyatt, the administratrix, and that he afterwards passed into defendant's possession; and then closed his case.

"Defendant then introduced Mr. Mealing as a witness, who testified, that he knew the negro Jeff; that he had been held and claimed by one Benjamin Mock, for fifteen or sixteen years previous to his death; and that the defendant held and claimed him as administrator of said Benjamin Mock, and trustee. Defendant offered to prove by his witness, in order to rebut unfairness in the sale, and that it was made without advertisement, that said William N Mock, the administrator, prior to the sale, told him that he was going to sell the negroes of the estate, and that he had advertised them for sale, and requested witness to attend the sale and purchase. This evidence was objected to by the plaintiff, on the ground of illegality in giving in evidence the declarations of the administrator in chief; but the objection was overruled, and the witness allowed to testify, and plaintiff excepted.

"Defendant offered to prove by this witness, also, that a great many persons were present at the sale; that he was there, and wanted to purchase, and bid for the negroes, but did not purchase because the negroes sold for more than he thought they were worth, and at public outcry to the highest bidder. To this evidence plaintiff objected on the ground of irrelevance; but the court overruled the objection, and allowed the witness to testify, and plaintiff excepted.

"Defendant then introduced one Edwards as a witness, by whom he offered to prove said William N. Mock's declarations

that he intended to sell the negroes, and requesting said Edwards to attend the sale and buy; and that Edwards did so, and purchased one for $680. Plaintiff objected to this evidence, as being the declarations of said Mock; but the objection was overruled, and the witness testified as above, and also that the slaves sold high, and that many persons were present; to all which the plaintiff excepted.

"The court charged the jury, that the order contained in said transcript, to sell the perishable property of said estate, was, under the opinion and judgment of the Supreme Court delivered in this case, an authority to said administrators in chief to sell the slave in question, and the fact that the administrators had sold under said order, and the further fact that the judge of said Orphans' Court had made the orders shown in said transcript on the return of said sale bill, were the reasons principally assigned by the Supreme Court; and that this was binding and conclusive, both on the court below and the jury, and nothing now appeared before them to change this result; and to this charge the plaintiff excepted.

"The plaintiff asked the court to charge as follows:—

"1. That if the negro now sued for was sold without being advertised, and was purchased by Mrs. Wyatt, the administratrix, by and with the consent and knowledge of Wm. N. Mock, the administrator, such sale and purchase by her was fraudulent and void, and the verdict should be for the plaintiff.

"2. That if the slave was sold without being advertised, and was purchased by Mrs. Wyatt, the administratrix, by and with the consent and approbation of Wm. N. Mock, the administrator, and she gave no note or bond with security for the purchase money, and this was assented to by said Wm. N. Mock, then such sale and purchase was fraudulent and void, and the plaintiff is entitled to recover.

"3. That if the negroes were not advertised thirty days, in three or more public places in the county, according to the requisitions of the statute, prior to the sale, then such sale and purchase by the administratrix would be void.

"4. That if, on the morning of the sale, but prior to the sale, the administrator and administratrix had conversed with one or more persons on the subject of their authority to sell the slaves, and had concluded and said that they had no pow-

er under the order to sell the slaves, and for this reason had not advertised them for sale, and did not apply for another order to sell the slaves because it would be too troublesome and would postpone and delay the sale, and said that "it made no odds, they would sell anyhow",—this is evidence to show, 1st, that the administrators did not understand the order as an authority to sell the slaves, and therefore, 2d, as evidence that they did not sell the slaves under the order; and if they did not sell under the order, such sale is fraudulent and void, especially in this case, where the administrator herself is the purchaser, and therefore the plaintiff is entitled to recover.

"5. That the fact that the judge of the Orphans' Court, on the return of the sale bill by the administrator, made the orders for the clerk to record and file it as an office document, is no evidence that he understood the order, to sell the perishable property, to mean all the personal property of the intestate; unless the jury are satisfied and believe from the evidence before them, that the judge, at the time he made said orders to record and file the sale bill, knew and remembered that, in the order to sell the property made in November, 1833, he had used the word *perishable*, and not *personal*; and therefore the orders made by the judge, to record and file the sale bill, cannot have any influence with the jury in making up their verdict.

"6. That the understanding of the administrators, of the order to sell perishable property, cannot be taken into consideration by the jury in making up their verdict.

"7. That the understanding of the judge of the Orphans' Court, of the order to sell perishable property, cannot be taken into consideration by the jury in making up their verdict.

"8. That the judge of the Orphans' Court has no power to order a sale of the personal property of a testator's or intestate's estate, unless it appears to be necessary.

"9. That the law requires the personal estate of intestates to be partitioned, unless it becomes necessary to sell.

"10. That if no debts were due and owing by the intestate, and no other necessity existed for the sale of the slaves, then the order to sell the perishable property, made on the same day on which the administration was granted, would not authorize the administrators to sell the slaves, and as such their verdict should be for the plaintiff.

"The court gave the first three charges; reminding the jury of Wm. Mock's declarations as to advertising the slaves, which evidence or declarations had been previously excepted to as illegal. All the other charges asked by plaintiff, as above set forth, were refused, and to each refusal plaintiff excepted."

The rulings of the court on the evidence, the charge given, and the refusals to charge as asked, are assigned for error.

THOS. WILLIAMS, for the appellant:

1. The judge of the Orphans' Court has no power, as judge, to order a sale of the personal estate of a testator or intestate, but can only do so in cases where it "appears to be necessary."—Clay's Digest, p. 223, § 13; Steele v. Knox, 10 Ala. 614. The law contemplates a partition, where the estate is solvent, and requires this to be done.—Steele v. Knox, *supra*; 1 Iredell's Law R. 259.

2. The order of the court, to sell the "perishable property" of the estate, did not authorize the administrator in chief to sell the slaves. The order was made on the same day the letters of administration were granted, and before the court could know that it was necessary to sell the slaves, either for the payment of debts, or for distribution. The term "perishable," as used in the order, cannot be construed to embrace slaves, whether taken in its general acceptation (Steele v. Knox, *supra*), or in its legal meaning.—3 Munf. 288; 2 N. H. 87; McMul. Eq. R. 459; Seargent on Attachment, p. 18; Conkling's Admiralty Practice, pp. 485, 507. For the legislative interpretation of the term, see Clay's Digest, p. 54, §§ 1, 2, 6; p. 56, §§ 7, 8; p. 58, § 14; p. 60, § 29; p. 61, § 33; p. 202, §§ 7, 8; p. 216, §§ 75, 78. Nor could any order made by the judge of the court aid the matter of sale, because, 1st, the court had no power to confirm or vacate the sale; and, 2d, because, if the sale was void for want of authority, no subsequent order could make it valid.

3. The sale of the slaves was void, as against all having an interest in the estate, though binding on the immediate parties to the contract of sale and purchase.—Clay's Digest, p. 223, §§ 13, 14; Weir v. Davis, 4 Ala. 442; Dearman v. Dearman, *ib.* 521; Fambro v. Gantt, 12 *ib.* 498; 10 Peters 161; 1 How.

Miss. 558; 2 Smedes & M. 527; 14 *ib.* 187; 1 Hill's (S. C.) R. 84; Swink's Adm'r v. Snodgrass, 17 Ala. 653; Hopper v. Steele, 18 *ib.* 828; Elliott v. Branch Bank at Mobile, 20 *ib.* 345.

4. The contract being against a positive statute, the administrator in chief was estopped from recovering the property.—Pistole v. Street, 5 Port. 64; 1 Ala. 449; 7 *ib.* 359; 3 M. & W. 240; 19 Conn. 338; Story on Contracts, § 491; Smith on Contracts, top p. 93.

5. The administrator in chief being estopped, the statute of limitations did not commence running until the appointment of the administrator *de bonis non*.—3 Stew. 172; Angell on Limitations, pp. 55 *et seq.*; Lawson's Adm'r v. Lay's Executor, 24 Ala. 184.

GEO. W. STONE, *contra*:

1. This court decided, when this case was formerly before it, that the order of the Orphans' Court of Lowndes, to sell the "perishable property", conferred ample authority on the administrator in chief to sell the slave and convey the title. The record fully shows that the slave was sold under that order, and hence the plaintiff has no title on which to maintain this action.—Steele v. Wyatt's Adm'r, 23 Ala. 764; Millard v. Hall, 24 *ib.* 209.

2. The testimony of Edwards and Mealing was only intended to show the publicity and fairness of the sale, and it certainly tended to do so. It was necessary for us to prove that the sale was public. Even if this proof was unnecessary, in whole or in part, it could not injure the appellant; and an innocent error, not prejudicial to the appellant, is no ground for reversal; nor will the court reverse, when, upon the whole case, the judgment is right. But the testimony was legal: it was in rebuttal of plaintiff's testimony.

3. The record of orders made by the same judge in other causes, and at other times, was *res inter alios acta*, and illegal as evidence in this case. The orders themselves must furnish their own exposition.

4. The charges asked were properly refused. They simply proposed to submit to the jury legal questions, viz., the proper construction of the orders, which were questions for the court.

5. The orphans-court judge had jurisdiction to grant the order of sale. Whether he exercised that jurisdiction rightfully or not cannot be inquired into collaterally. At all events, the charges which proposed to raise that question were clearly improper, and were rightly refused.

CHILTON, C. J.—1. A portion of the testimony of the witness Mealing, we should be inclined to reject as illegal; while other portions of it, tending to show efforts on the part of the administrators to procure bidders, and to give publicity to the sale, were entirely proper. But it was objected to as a whole—that is, two portions of it were embraced in separate objections going to each as a whole; and as each contains some legal proof, the court properly overruled the motions to exclude, since it was not authorized to reject that which was proper, nor bound to sift the evidence so as to separate it from that which was improper. Such have been the uniform decisions of this court.

2. There was no error in excluding from the jury the orders of the judge of the Orphans' Court, made in the matter of other estates, and which were offered as evidence of what the judge of said Orphans' Court meant by the order to sell the perishable property of Wyatt's estate. Such evidence was illegal for two reasons: 1st, it was clearly *res inter alios*; and, 2d, the construction of the order was for the court, and not for the jury. This the court must do, upon an inspection of the record of the Orphans' Court. That record showed the order, the sale of the personal property after it was granted, as returned by the administrator under oath, and the judicial enrollment of the inventory of the sale, as a part of the record of said court in the matter of the proceeding in said estate. These, we held, when the case was before us at a previous term, (see 23 Ala. 764,) showed that the order conferred authority to sell the slaves, as practically construed by the court making it and the parties acting under it.

3. The previous opinion of this court must stand as the law of this case; and as the record before us develops no proof materially changing the aspect in which it was then presented, the court below very properly charged the jury, that the former decision was binding upon the primary court,

that the order warranted the sale of the slave in suit, and that the result of the decision upon this point was not affected by any evidence which had been submitted.

4. The fourth charge, which is somewhat involved, but which is adroitly drawn, when clearly considered, cannot be supported. The point in that charge is, not that the administrator sold the slaves without advertising them, which should avoid the sale. That, with other supposed irregularities, had been distinctly submitted to the jury by the three charges immediately preceding the one under consideration. But the question presented by this charge was, conceding the order conferred authority to sell the slaves, and that they were sold, and the return of the sale was duly made and recorded,—conceding, in other words, that everything had been actually conducted as required by law, save that the administrators did not believe the order conferred authority to sell the slaves, and consequently did not deem the sale as made under it, that this would make the purchase at such sale by one of the administrators, fraudulent and void.

It is not pretended that this was a private sale—all the proof shows that it was public. Neither is there any evidence tending to show that the property was purchased at an under value. Nor is it attempted to show that the views said to be entertained by the administrators as to their authority to sell under the order were made known to the bidders. The contrary is inferable from the facts hypothetically stated in the charge. Now, if the sale was properly made in other respects, we do not see how the mere opinion, or mind of the personal representatives, which had not the least practical influence upon it, could in any way affect its validity. If it be supposed by the appellant's counsel that the former opinion of this court countenances the idea of going into proof *aliunde* to show the meaning of the order, he mistakes that opinion.—The practical construction of the parties and of the Orphans' Court was apparent from the record of that court. It would never do to allow the mere opinion, a mental reservation of the administrators, to invalidate a sale shown by the record to be valid, more especially after the lapse of some eighteen years, and thus to overturn titles upon which purchasers have so long reposed. The order must, as we have said, be con-

strued by the court upon an inspection of the record, and thus construed, furnished, as a conclusion of law, authority for the sale which was afterwards made; and if the sale was made in accordance with law, it is wholly immaterial what the administrators thought as to the extent of their authority, or about their compliance with it. We have not considered the failure to advertise in connection with this charge, for the reason, that the court had just charged, that if such failure existed, it avoided the sale. The court was not bound to repeat the charge; nor can we suppose the counsel intended, after having obtained the opinion of the court in a direct specific charge, that the failure to advertise would, of itself, render the sale invalid, to obtain a charge much less favorable to his side, by requiring the jury to find several other facts besides, and in addition to the want of advertisement, in order to avoid the sale. Whether the charges respecting the advertisement, the giving of bond and security, &c., were not too favorable to appellant, is a question we need not now decide. See, however, on this subject, Lay's Ex'rs v. Lawson's Adm'r, 23 Ala. 377. Esteeming it, then, as a charge which assumes that the *quo animo* of the party making the sale should avoid it, although such intent had not the least practical bearing on the sale, we think the court very properly overruled it.

5. The sixth and seventh charges asserted correct propositions of law. The jury had nothing to do with the understanding of the administrators, or of the Orphans' Court judge as to the meaning of the order of sale—that was for the court. But the appellant has not been injured by the refusal of these charges: they amounted to nothing more than instructions to the jury, that they had nothing to do with the decision of a question of law which the court had already correctly decided *against* the appellant. In this aspect, their refusal was clearly for the appellant's advantage; for, if the judge, by rejecting them, impliedly admitted the right of the jury to revise his decision adverse to appellant on a point of law, it gave the appellant an additional chance for a verdict, of which, of course, he cannot complain.

6. The other charges (numbers eight, nine and ten) question the jurisdiction of the Orphans' Court to make the order for

the sale of the slaves, because it does not appear to have been necessary.

Whether a sale was necessary, was a question for the determination of the Orphans' Court—a question upon which its jurisdiction depended; and the rule is well settled, that where the jurisdiction of a court depends upon a fact which such court is required to ascertain and settle by its decision, as a preliminary to its jurisdiction, then the exercise of its jurisdiction implies the previous ascertainment of the preliminary jurisdictional fact, and the decision of the court as to the jurisdictional fact cannot collaterally be called in question.—Brittain v. Kinnard, 1 Brod. & Bing. 432; S. C., 5 Eng. Com. Law R. 137; 3 Phil. Ev. Cowen & Hill's Notes, pp. 10, 16, *et seq.*

Having decided that the order warranted the sale of the slave in question, the necessity for the order, being a preliminary question to be settled by the court, and without the ascertainment of which such order could not properly have been made, must be considered as having been made apparent to the court. This necessity might be shown even contemporaneously with the grant of administration. The three last charges were, therefore, properly refused.

Upon a careful examination of the record, and the points raised upon it, most of which are substantially covered by the previous decision, we can see no error prejudicial to the appellant. The judgment is consequently affirmed.

FENNER ET AL. *vs.* KIRKMAN.

1. In detinue for a slave, a recovery cannot be had against a defendant who was out of possession at the date of the writ, on proof of his prior possession at the time plaintiff's vested remainder fell in by the termination of the precedent life estate, if he afterwards parted with it, without fault, under a contract of hiring, before suit brought or demand made.

APPEAL from the Circuit Court of Lauderdale.

Tried before the Hon. THOMAS A. WALKER.

DETINUE (under the Code) for a slave named Wilson, by Joseph F. Fenner, in his own right and as administrator of Robert Fenner, deceased, Thomas B. Fenner, Richard H. Fenner, Julius Johnson and Mary his wife, Julius Johnson as administrator of the respective estates of John H. Fenner and Fredonia Fenner, both deceased, Margaret E. Fenner, Ann M. Fenner, and Lucy M. Fenner, (the last two being infants, who sue by their next friend, Julius Johnson,) against Thomas Kirkman. The writ was issued on 6th September, 1853.

The plaintiffs' bill of exceptions is as follows :—

"In this cause, the parties proceeded to trial at this term of the court on issues joined. It was in proof before the jury, that Robert Fenner was tenant for life of the slave sued for; and furthermore, by the will creating the life estate in said Robert Fenner, it was in proof, that the plaintiffs took a vested remainder in said slave on the termination of said life estate in said Robert Fenner. It was in proof, also, that Robert Fenner departed this life on the 19th day of September, 1847, at which time the defendant had possession of the said slave, and has had the possession continually ever since, with the exception of part of the year 1853—that is to say, from the — day of May, 1853, to the 1st January, 1854—during which time he was hired out by said defendant, but was again returned to him on the 1st of January, 1854.

"On this proof, the plaintiffs asked the court to charge the jury, that if they believed from the evidence that defendant had possession of the slave sued for, at a time subsequent to the death of Robert Fenner, then his parting with that possession afterwards, and being out of possession at the date of the writ, constitute no defence to this action; which charge the court refused to give, and the plaintiffs excepted."

The charge of the court is now assigned for error.

DAVID P. LEWIS, for the appellants :

1. While it is admitted, that detinue will not lie when the recovery of the chattel in specie is impossible (Lindsay v. Perry, 1 Ala. 204); still, it is insisted, the facts of this case show that the recovery of the slave in specie was entirely possible.—Pool v. Adkisson, 1 Dana's R. 111 to 119.

2. The wrongful detention of the slave is the gist of the

action.—Walker v. Fenner, 20 Ala. 198. The facts show a wrongful detention from 1847 to 1853; a ground of detinue, of which the law will not deprive plaintiff, unless a recovery of the slave in specie is impossible.

3. The facts of this case clearly distinguish it from Walker v. Fenner, *supra*. Here, defendant wrongfully and illegally parted with the possession of the slave: his estate had terminated before the hiring. Kirkman might have surrendered the slave before suit brought; Walker could not.

4. Detinue lies, whenever defendant has had possession of the chattel sued for, but has parted with it before the date of the writ, without legal compulsion.—Pool v. Adkisson, *supra*. And detinue lies for tortious detention, when defendant has been in possession, without right, while plaintiff had right; unless he has lost the possession by casualty, or by lawful eviction.—Rucker v. Hamilton, 3 Dana's R. 44. These principles are entirely consistent with Walker v. Fenner and Lindsay v. Perry, *supra*. The defendant's voluntary disposition of the slave, without right, seems conclusive on him that he can still control it for the purpose of satisfying the judgment by surrendering it.

5. If the defence attempted in this case should be sustained, plaintiff may at any time be deprived of the peculiar benefits of this action by a wrongful act of the defendant, the positively fraudulent intention of which he cannot possibly prove, and of the very existence of which he may be utterly and necessarily ignorant at the date of the writ.

R. W. WALKER, *contra*:

1. Where the defendant is not in possession at the date of the writ, the action of detinue cannot be maintained against him, unless it is shown that he had parted with the property wrongfully, or fraudulently, to affect the plaintiffs' right to the action.—Walker v. Fenner, 20 Ala. 199. *It must be shown* that he wrongfully parted with the possession—the burthen of proof is on the plaintiff. The true rule is, that "if defendant has parted with the possession, without any intentional derogation of the true owner's title, he is not liable in this action."—Caldwell v. Ford, Riley's Law Cases, pp. 277-80; Kershaw's Executors v. Boykin, 1 Brev. 301; Charles v.

Elliott, 4 Dev. & Bat. L. 468; Story on Bailments, § 101. In this case, there is no evidence how Kirkman obtained possession, or through whom he claimed title—whether by purchase from Robert Fenner, or under a right wholly adverse; it is not shown that any demand, or notice of title, was given or made by plaintiff before suit brought; there is no proof, in fact, that he ever heard of Fenner's right before suit brought. Robert Fenner died in 1847, and the suit was brought in September, 1852—five years afterwards. Did Kirkman ever hear of plaintiffs' claim until then? did he know of Fenner's death? did he even know of his existence? The record furnishes no affirmative answer, either expressly or by implication. In the absence of any such knowledge or notice of plaintiffs' claim, is he to be denied the exercise of the ordinary rights of ownership? According to the appellants' argument, though plaintiffs might have never sued, yet defendant could never have hired out the slave, without being guilty of a tort or a fraud.

2. Every legal intendment is made in favor of the affirmance of judgments; and where a charge, as applicable to the facts, may or may not be correct, it is incumbent on the party complaining to set out in the record so much of the evidence as is necessary to show its error.—Green v. Tims, 16 Ala. 546; Gaines v. Harvin, 19 *ib.* 499; Knapp v. McBride, 7 *ib.* 29; King v. Crocheron, 14 *ib.* 826. If a bill of exceptions be so framed, that it cannot be learned from the record whether or not error has intervened, though there is some reason to believe that it probably has, the court is bound to affirm the judgment.—Adams v. Ellis, 1 Aik. 24, 180, cited in Knapp v. McBride, *supra*. Is the court to *presume* that a citizen has violated the law and committed a fraud?

GOLDTHWAITE, J.—We understand the charge requested by the appellant to assert the legal proposition, that if a defendant in detinue is proved to have possession of property belonging to the plaintiff before the commencement of the suit, a recovery can be had, if the property is in existence, although the defendant may without fault have parted with the possession and control before demand made, or suit commenced.

All the books agree, that the *gist* of the action of detinue is the detention, and not the original taking; but whether it can be sustained for every detention, before demand or suit, which is not under a finding or bailment, or authorized by the owner, is a question on which there is some conflict of authority; but the form of the writ—which is, that the sheriff command A that he render to B one, &c., which he unjustly *detains* from him, &c. (Fitzherbert's N. B. 323)—and the history of it, as given by the old writers, who speak of it in connection alone with the refusal on the part of the borrower or finder of the goods, to deliver them on demand of the true owner, or a bailee bound by his contract to deliver them at a certain time, and failing to do so, are persuasive to show that a possession at the time of the demand or suit was required. It is true that in Comyn's Digest, (Detinue, A,) it is said, that the action lies, though the defendant quitted the possession before action brought; and he cites Bro. Detinue. But we think that author refers to the cases to which the action was applied in those times; which were those we have already mentioned,—findings and bailments, in either of which instances, as he parted with the goods knowing that they did not belong to him, it might properly be regarded as a culpable disposition of them on his part; and if the goods were in existence, and the end of the action might therefore be accomplished, it would be against justice to allow the defendant to defeat it by proving his own wrongful act.

But a very different case is presented, when one comes into possession by a lawful act, and in ignorance of the rights of the true owner, as by a purchase from one in possession, who has ostensibly the right to sell. His possession is not wrongful or unjust in the sense in which those terms are applied to the finder or borrower who refuses to deliver to the real owner upon demand; and if he, without notice of title in another, parts with the control of the property before demand or suit, although he may be liable for the value in another form of action, it would be unjust to hold him to deliver the specific goods. In cases of bailment, by the civil and French law, if the heir or administrator of a deceased bailee sell the thing in ignorance of the bailment, he is liable but for the price, and only when he has received it (Digest, lib. 16, tit. 3, c. 1;

Story on Bailments, § 101); and upon analogous principles, in the case we have put, the party should not be liable beyond the value of the thing sold and interest from the time of the conversion.

What we have said is supported by the case of Fenner v. Walker, 20 Ala. 192, in which it is said, with regard to this action, "that to enable the plaintiffs to recover, they must show that the defendant, either at the time of the demand made, or, in the event that there was no demand, at the time the writ was sued out, had the actual possession, or the controlling power over the property; unless, having the possession anterior to such demand or suit, he has wrongfully, or to elude the plaintiff's action, parted with it, or unless he holds it under a contract of bailment which he violates by failing to deliver it."—See, also, Caldwell v. Ford, Riley 277; Kershaw v. Boykin, 1 Brevard 301; Charles v. Elliott, 4 Dev. & Bat. 468. So, in Harris v. Hillman, at this term, we held, that a purchaser at sheriff's sale having subsequently hired out the slave bought, without notice that the plaintiff had any right, or intended to call in question the claim of the defendant; and being thus divested of the control and possession of the slave at the commencement of the suit, no previous demand having been made,—the action was not maintainable on the prior possession. The question presented upon this record is fully covered by the last case cited.

Judgment affirmed.

ECKLES & BROWN *vs.* BATES.

1. The declarations of a slave, made while sick to a physician or any other person, relative to the symptoms and nature of the disease under which he is laboring, are admissible evidence upon the principle of *res gestæ*, as well as from the necessity of the case.
2. The slave's declarations, also, as to his symptoms and condition during previous similar attacks, upon which the physician in part relies in forming his opinion as to the duration and character of the disease, are competent evi-

dence on the same principle, as furnishing the basis in part of that opinion, but for no other purpose.

3. But the slave's declarations to other persons not skilled in the science of medicine, as to his previous attacks, the medicines which he then took, and his opinion that those attacks were similar to his present sickness, are not admissible evidence.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN GILL SHORTER.

COVENANT by George M. Bates against Eckles & Brown, to recover damages for the breach of a warranty of soundness, contained in a sealed bill of sale of a slave named Toney, sold by defendants to plaintiff in January, 1851.

On the trial, as defendants' bill of exceptions discloses, a great number of exceptions were saved to the rulings of the court in the admission and exclusion of evidence on the question of the slave's unsoundness; but of these it is only necessary to state such as are decided by this court. The plaintiff first read in evidence the bill of sale containing the warranty of soundness, and then offered the deposition of Doct. Peterson, who testified that he had been called to see the slave professionally by the plaintiff, and had visited him afterwards during his sickness, and had made a *post-mortem* examination of his body. This witness described with great particularity the symptoms and character of the disease, and in his answer to the fifth interrogatory by plaintiff, among other things, used this language: "*In conversation with the negro, I learned from him, though he made the statement with extreme reluctance, that he had been subject to similar attacks before, and had been very ill from one such attack years previous.* I omitted to give these statements in my answer as to the facts which determined my treatment of the disease. * * * *From the statement of the negro, and the symptoms of the disease, together with the post-mortem examination, my medical opinion is, that the negro had been unsound for years.*" The defendants moved to exclude from the jury, "as illegal and irrelevant," those portions of the above answer which are italicized; but the court overruled each motion, and the defendants excepted.

The plaintiffs offered in evidence, also, the depositions of Mrs. Mary Treadwell and Miss Sarah Stevens, taken on in-

terrogatories, to the third and fourth of which, before crossing them, the defendants objected, "on the ground that the testimony sought to be obtained by them is illegal and irrelevant." These interrogatories, with the answers thereto, were as follows:

"3. Did you ever hear said slave, when sick and suffering under disease, in reply to inquiries as to the complaint under which he was suffering, speak of said complaint, and of its symptoms, and of the length of time during which he had suffered under said complaint? If so, state when this was, and where, and to whom such statements were made by said slave, and how said slave came to make them; and then state all that he said in that connection, and the condition of the slave when he made them.

"4. Did you ever know said slave to complain of being sick? If so, state what he said as to his condition when making such complaints, and to whom this was said, and where."

Mrs. Treadwell answered these interrogatories as follows:

"Ans. to 3d int.—At a time when said slave was suffering under the illness of which he died, he made frequent suggestions as to the treatment to be used, which led to inquiries on my part whether he had ever before been afflicted in the same way. *He replied that he had been subject to similar attacks, and had generally been relieved by drinking soap-suds.* He was at that time laboring under severe pain in the stomach, and it was in the stomach that he complained of pain. This was on Saturday, a few hours after being attacked, and he died on the following Monday. *He opposed the use of the remedies which we had been applying, and insisted on the use of those which he had been in the habit of using; and the remedies which he suggested were used, and seemed to afford momentary relief.* The statements were made to Mrs. Bates and myself, at the residence of Mr. Bates in Barbour county. He was at that time suffering intensely, *and remarked, that he had been as bad off before with the same disease. In addition to drinking soap-suds, he said, he had also been benefited previously by being put in a barrel of warm water.*

"Ans. to 4th int.—At the time said statements were made, he appeared to be suffering in the stomach, and his conduct

and movements were such as to induce the belief that he was laboring under a severe attack of the colic. These were the complaints made by him at that time. This was the only time I ever knew him to complain, or be sick, although I had seen him before, but never had any conversation with him."

The answers of Miss Stevens were as follows :—

"Ans. to 3d int.—*I have heard said slave, when suffering under pain in the stomach, as he stated, and also as indicated in his action, say that he was suffering under such pain, and suggest the use of red pepper, which he usually carried in his pocket and used habitually. Such complaints and suggestions I have frequently heard him make; and he often asked for syrup, and said meat would hurt him.* His ordinary movements about the room were slow, and in a stooping attitude. I resided in the family of Mr. Bates, but was not at home when said slave was attacked with his last illness. I got home the day before his death, and he had then all the indications of severe pain in the stomach.

"Ans. to 4th int.—In my answer to the third direct interrogatory, I have stated all I know in answer to this."

The bill of exceptions states, that "there was no proof before the court that Mrs. Treadwell was in any manner medically informed as to the nature and character of diseases, and there was no proof that Miss Stevens was medically skilled." In addition to their general objections to the third and fourth interrogatories propounded to these witnesses, the defendants objected to specific portions of each; also, to the entire answer to each interrogatory, and to such portions of each, separately, as are italicized. All of these objections the court overruled, and admitted all the evidence; and to the ruling of the court on each separate objection the defendants excepted. These rulings of the court are now assigned for error.

Belser & Barrett, for the appellant, cited the following cases: Thompson v. Mawhinney, 17 Ala. 366; Fairlie v. Hastings, 10 Vesey's R. 123; Parris v. Jenkins, 2 Rich. Law R. 106; Jones v. Nirdlinger, 20 Ala. 488; Stephens v. Chappell, 3 Strob. Law R. 80.

Elmore & Yancey, *contra*, cited and relied on Rowland v.

Walker, 18 Ala. 749; Turney v. Knox, 7 Mon. 88; Aveson v. Lord Kinnard, 6 East's R. 188.

CHILTON, C. J.—We fully recognize the doctrine, as asserted in Rowland v. Walker, 18 Ala. R. 749, that the declarations of a slave, made when sick, relative to the symptoms and nature of the disease *under which he is laboring*, whether made to a physician or other person, are admissible as original evidence. Such declarations are admissible as explanatory of the present condition of the slave, upon the principle of *res gestæ*, as well as upon the necessity of the case.

We are also of opinion, that what the slave said to the physician, both as respected his condition at the time he was called to see him, and his previous physical symptoms, on which the physician in part relied in forming his opinion as to the duration of the disease and its character, was properly received, as furnishing the basis in part for that opinion, but for no other purpose. If, in the judgment of a scientific physician, the previous condition of the slave was so described as to aid him, in connection with the other attendant circumstances, in forming a correct judgment as to the length of time the slave had been diseased, it is not for the court to exclude the opinion of the physician because he has availed himself of these declarations. That opinion goes to the jury, with the facts on which it is founded, for what it is worth. They, of course, will look to the data upon which it is predicated, and give it more or less weight as the circumstances may afford a sure or dubious test of the slave's previous condition. In this view, the declarations of the slave, describing his physical habitudes, his present and past sufferings, and the symptoms accompanying them, become part of the *res gestæ*, as they enable the physician, when considered in connection with his then apparent condition, to form a more correct idea of the character of his disease, and direct his inquiries and aid his investigation into its nature upon the *post-mortem* examination which was made.—Turney v. Knox, 7 Mon. 88.

But the declarations of the slave, as to his previous attacks and the medicine which he took, which are merely narrative of past events, not made to the physician as constituting any part of the foundation for a medical opinion, but to the

female witnesses who deposed in this case, and who are not skilled in the science of medicine, were improperly allowed to go to the jury. What the slave did and said, as explanatory of his condition at the time he was laboring under the disease, they might well depose to, as this constituted part of the *res gestæ;* but his previous attacks, and his opinion as to their similarity with that under which he was then laboring, constituted no part of the *res*, and could only be admitted in connection with, and as the foundation of, the opinion of a physician. Such declarations are not, therefore, legal evidence, when offered by themselves as original proof. Were such the law, it would be an easy matter to prove slaves unsound by their declarations of their unsoundness, oftentimes feigned as an excuse to avoid labor, or to procure a change of masters. They are incompetent to testify against a white person, and to permit their declarations to be made original proof, except as they constitute part of the *res gestæ*, or are made in connection with and as furnishing a basis for the opinion of physicians, would be to let in all the evils which their exclusion as witnesses was designed to avert.—See Lush v. McDaniel, 13 Iredell's Law R. 485.

The above principles will be easy of application to the proof in this cause upon another trial, and we need not, therefore, prolong this opinion by a specific application of them.

Let the judgment be reversed, and the cause remanded.

RICE, J., having been of counsel, did not sit in this case.

ROLSTON *vs.* LANGDON.

1. A purely abstract charge, which could not have misled the jury, furnishes no ground of reversal.
2. When a charge asked needs to be qualified, or explained, to prevent it from misleading the jury, it may be refused; e. g., a charge which asserts that the plaintiff, in order to avoid the bar of the statute of limitations when pleaded to an open account, must prove not only a subsequent promise, but also that it was made "with a full knowledge of all the facts."

3. When a charge is asked which admits of two constructions, one of which is calculated to confuse and mislead the jury, it may be refused.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

ACTION (under the Code) on an open account for $84, due March 1, 1853, by Charles C. Langdon against John Rolston. The defendant filed several pleas, viz.:—

"1. That he does not owe the amount of said account, never did owe it, and never promised to pay it.

"2. That he has paid the debt for which this suit is brought.

"3. That said account is barred by the statute of limitations, both of three and six years.

"4. That plaintiff, at the time said summons was sued out, was indebted to him in the sum of $500, for money paid out and expended in the purchase of a buggy for plaintiff, and in divers other ways, to aid said plaintiff to be elected to Congress; and in the further sum of $2,000, for work and labor, care and diligence, bestowed about the business of plaintiff, and for services rendered to him."

The plaintiff filed several replications to these pleas, viz.:

"1. That the defendant does owe the account sued on, has owed it for a long time, has been dunned for it times innumerable, and has made at least one hundred promises to pay it.

"2. That defendant has never paid said account, but has, at different times, paid on account of the same $21 50, with which he has been duly credited; the last payment being made on the 17th February, 1852, at which time the defendant acknowledged the correctness of said account, and promised to pay it, but has never complied with his said promise.

"3. That said account is not barred by the statute of limitations, either of three or of six years.

"4. Plaintiff denies that, at the time said summons was sued out, he was indebted to said defendant in the sum of $500, for money paid by him in the purchase of a buggy for plaintiff, or in divers other ways expended to aid him (plaintiff) to be elected to Congress; but, on the contrary, plaintiff believes that, by the pretended friendship of defendant, and by his pretended efforts to aid in plaintiff's election to Congress, he (plaintiff) lost one thousand votes, which being estimated at

two dollars and fifty cents per vote, plaintiff says he has sustained damage, at defendant's hands, to the amount of $2,500, independent of the account sued on. Plaintiff denies, also, that he owes defendant the further sum of $2,000, for work and labor, care and diligence, bestowed by defendant about plaintiff's business, or for services rendered by him to plaintiff; but, on the contrary, defendant has been paid in full by plaintiff, in publishing the heavy political articles written by said defendant from Baldwin county, and in publishing, at defendant's earnest request, divers effusions of what he (defendant) called poetry."

On the trial, the defendant excepted to several rulings of the court, which are thus stated in his bill of exceptions:

"To support his case, plaintiff introduced as a witness Levi Langdon, who testified, that he was, or had been, the book-keeper of the plaintiff, and that the account sued on was correct. On cross-examination, he was asked, whether he knew, of his own knowledge, that the first two items of said account were true; to which he said, he did not, of his own knowledge, but supposed they were. He was asked, also, whether he knew, of his own knowledge, that defendant subscribed for the "Daily Advertiser," for the years beginning with November 1, 1843, and running to November 1, 1849; to which he answered, that he did not, but that defendant frequently came to the desk and got a paper; that no paper had, during that time, been ordered to be left at his office or residence; and that the balance of the items were of his own knowledge. He further stated, that on the 27th February, 1852, defendant subscribed for the "Daily Advertiser," and paid ten dollars on account, and at the same time subscribed for said paper for one year from that date, the price being ten dollars; that no account was presented to defendant at the time, and nothing was said about an account, the amount, or anything about it, except that defendant paid ten dollars on the general account; that no account had previously been presented to defendant; that afterwards, to-wit, in 1853, an account had been presented to him for payment, that he did not admit it, but said that it was not just and he would not pay it; that the account sued on had never been presented to him, but he (witness) thought it was a copy (or near it) of the

one which had been presented to him. He further stated, that defendant had written several communications for the paper, which were published, &c., but he did not know whether he had been requested to do so by plaintiff.

"Daniel Langdon was then put on the stand, who testified, that he had presented an account to defendant, but defendant did not admit its correctness, nor did he promise to pay it; and that the account sued on was not the account presented. Henry Jones, who was then put upon the stand, testified, that the account sued on was made out by him from a copy which Mr. Langdon handed him. The defendant then offered some evidence, conducing to prove what would be the value of a column of matter prepared for a paper, supposing it was approved by the editor or proprietor, and was of value to them or their paper.

"The court charged the jury, among other things, that it did not make any difference whether the defendant wrote for the paper, and his communications were examined and approved by the editor, and were of value to the paper—that unless there was a request, on the part of the editor, to write them, defendant could not set them up as a set-off in this case, but, on the contrary, the editor had a right to charge for putting them in his paper; to which charge the defendant excepted."

The defendant asked the following charges:—

"1. That if the statute of limitations had perfected a bar, then, to authorize plaintiff to recover, there must be a subsequent promise, with a full knowledge of all the facts; which charge the court refused, and defendant excepted.

"2. That if an account is barred by the statute of limitations, a subsequent payment, to take it out of the statute of limitations, must be made on the account; and if no account was presented at the time, and nothing was said about an account at the time, then the payment is not sufficient to take it out of the statute; which charge the court refused, and the defendant excepted.

"3. That if defendant wrote for the paper, with the knowledge and approval of the editor or proprietor, and the communications were of value to the paper, though nothing was said at the time about payment, still the defendant is entitled to reasonable compensation therefor; which charge the court refused, and the defendant excepted."

The charge given, and the refusal to charge as requested, are now assigned for error.

WM. BOYLES, for the appellant.

J. Y. BLOCKER, *contra.*

RICE, J.—There is an agreement of counsel of record, showing that "the bill of exceptions contains all the evidence offered on the trial of this cause." This being so, it is clear that the charge given by the court is purely abstract, and could not have misled the jury. Such a charge, even if erroneous, furnishes no ground of reversal.—Salmons v. Roundtree, 24 Ala. 458; Magee v. Billingsley, 3 Ala. 680.

When a charge asked needs to be qualified, or explained, to prevent it from misleading the jury, it may be refused.—Swallow v. The State, 22 Ala. 20.

When a charge as asked admits of two constructions, one of which is well calculated to confuse and mislead the jury, it may be refused.—Ross v. Ross, 20 Ala. 105.

The application of these rules to this case, results in the conclusion, that there was no error in the refusal of the first and second charges as asked by appellant. The first assumes, that, to avoid the bar of the statute of limitations, the plaintiff was not only bound to prove a subsequent promise, but to go further, and prove that it was made "with a full knowledge of all the facts."—Kennon v. McRea, 7 Porter 175.

The second admits of the following construction: that when a debt is due by account, *the account* is *the debt*; and that although there may be a subsequent partial payment of *the debt*, within less than three years before suit brought, such payment cannot remove the bar of the statute of limitations, unless it is "made on *the account*." This objection to this charge is not removed by admitting that it admits of a different construction. See cases above cited.

The third charge is abstract, and for that reason was properly refused.

There is no error in the record of which the appellant can avail himself, and the judgment of the court below is affirmed.

GILMER & TAYLOR *vs.* THE CITY COUNCIL OF MONTGOMERY.

1. If a question calls for evidence irrelevant to the issue, an objection to it is sufficient to exclude the evidence, without a separate objection to the answer.
2. In case against a municipal corporation, to recover damages for its neglect of duty in suffering plaintiff's land to be overflowed by the rain water which passed through the sewers in the streets of the city, and accumulated in a ravine emptying into the river, a witness cannot be asked, on behalf of the defendant, "if there were not other ravines in the city which had increased in size for the last twenty years in as great proportion as this ravine had increased."
3. It being shown that plaintiff had built a wall and embankment on his land, which extended partly across the ravine and narrowed the channel through which the water flowed into the river, a witness for the defence, who had been for many years engaged in building brick walls and houses, may be asked "if he did not tell plaintiff, that if he built said wall in said ravine, it would fall by reason of the flood in said ravine."
4. Where the evidence set out in the plaintiff's bill of exceptions shows that he was not entitled to recover, the court will not, on error assigned by him, inquire into the correctness of the charges given by the court at the instance of the defendant.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. ROBERT DOUGHERTY.

ACTION ON THE CASE by Francis M. Gilmer and William Taylor against the City Council of Montgomery, "to recover damages," as the endorsement on the writ states, "for defendant's negligence and carelessness in permitting the rain water to run upon plaintiffs' lots, Nos. 1, 2, 9 and 10 in square No. 2, known as the Bibb & Nickels warehouse, from —— street in the city of Montgomery, and thereby washing and undermining plaintiffs' said lots, and injuring the same."

The plaintiffs' bill of exceptions shows these facts:—

"It was in evidence, that plaintiffs bought lots Nos. 9 and 10, named in the declaration, on the 4th January, 1850; and that said lots lay in the city of Montgomery, at the point where Moulton and Water streets intersected. There was evidence, also, tending to show that when said lots were thus bought, a ravine existed in Moulton street, running from the

river several hundred feet back into Moulton street; that said ravine was, in part, also, upon a portion of said lots, and that it had increased on said lots, in width and depth, after said purchase, up to the summer of 1851; also, that said ravine had been commenced as early as 1833, by the wash of rain water, which naturally found its way to the Alabama river at the point where said ravine was formed; that within ten years previous to the bringing of this action, said city council had, by annual working upon the streets, and by forming ditches and filling up hollows in said city, up to the year 1851, diverted a considerable quantity of rain water, which naturally found its way into said river at other points than said ravine, into the said ravine, and had thereby increased the quantity of water which ran into said ravine through Moulton street. The defendant proposed to ask a witness on the stand, 'if there were not other ravines in the city which had increased in size for the last twenty years in as great a proportion as this ravine had increased.' Plaintiffs objected to this question, but the court overruled the objection, and allowed the question to be put; and to this the plaintiffs excepted. Witness answered, that there were.

"It was in evidence, also, that plaintiffs, some time in 1851, gave notice to said city council, that they desired to commence improving their said lots, and that said council should take steps to protect their said lots and improvements from damage by reason of said ravine and the flow of water therein in Moulton street; that said city council considered upon said notice, and, after repeated urging, appointed a committee to investigate the matter; that said committee was raised on the 23d June, 1851, and discharged on the 12th August, 1851, and did nothing but throw a little brush into the head of the ravine, which only made it worse; that in July, 1851, plaintiffs commenced filling up said ravine on their said lots, and building a brick wall on the line of their said lots, in said ravine, and built a wall, twenty-two feet high and three feet wide at the foundation, with hydraulic cement, and built it two hundred and twenty-five feet on Moulton street, and eighty feet on Water street, and made an embankment in said ravine on Moulton street, by the side of their wall, about eight feet wide, and seven or eight feet high above the bottom

of the ravine; and that said ravine was about twelve feet deep. There was evidence, also, that said work extended on the line of said lots nearly across said ravine, to within about ten feet from the bluff of said ravine, which was in Moulton street; that said bluff was as high as said wall, and that said wall and embankment narrowed the aperture in said ravine through which the water flowed. The defendant proposed to ask a witness, who had been engaged in building brick houses and brick walls for the last seventeen years, if he did not tell said F. M. Gilmer, William Taylor not being present, 'that if he built said wall in said ravine, it would fall by reason of the floods in said ravine.' Plaintiffs objected to this question, but the court overruled the objection, and allowed the question to be asked; and to this plaintiffs excepted. Witness answered, that he did tell him so.

There was evidence, also, that about the first of September, 1851, a heavy rain occurred, and the wall was washed down, and a large quantity of earth was washed out of said lots. There was evidence, also, tending to show that plaintiffs had not quite filled up that part of said ravine on their said lots, but had filled it up some eight feet deep, leaving about three feet in depth below the level of the balance of said lots; that plaintiffs had left a gap on the top of their said wall in Moulton street, the bottom of which was five feet above the level of the surrounding earth, and that, when the wall fell, all that fell was that part included between the river on Water street and one side of that gap. The only witness who testified as to that gap, swore that the water did not rise within five feet of that gap, and that no water had flowed into the lots through that gap, and that there was a distance of twelve feet, or more, between the edge of the gap and the nearest edge of the water that ran into the lots from Moulton street. There was evidence, also, tending to show that the flood running into the ravine undermined the high bluff of the ravine, and that it fell across the ravine, and filled it up, and knocked down the wall, and that the flood poured over the broken wall, and washed out the dirt in the lots; also, that the water which fell in said lots had accumulated against the wall, and washed it down; that there were a few gullies running through said lots, emptying themselves in said ravine

when said wall was built, and that some of the water came from off plaintiffs' warehouse.

"Upon this evidence, the defendant's counsel asked the court to charge the jury as follows:—

"1. That if plaintiffs built their wall partly across said ravine, and near the opposite bank of it, and then threw up a side-walk, six or eight feet wide and six or eight feet high, on the outside of said wall, and thereby caused the current to be forced against the opposite bank, and the same was undermined, and washed down, and fell against the said wall, and in falling knocked down the said wall,—then plaintiffs could not recover; which charge the court gave, and the plaintiffs excepted.

"2. That if the jury believe from the entire evidence that the injury done to plaintiffs' property was effected by the plaintiffs' own acts and imprudence, then they cannot recover; which charge the court gave, and the plaintiffs excepted.

"3. That if they believe from the whole evidence that the damage done to plaintiffs' property was effected, partly by their own acts and imprudence, and partly by the acts, negligence, and imprudence of the defendant, then plaintiffs can only recover so much damages as they have experienced by the defendant's act; which charge the court gave, and plaintiffs excepted.

"4. That if they were unable to apportion and separate the injury done by plaintiffs from that done by defendant to said property, then plaintiffs cannot recover; which charge the court gave, and plaintiffs excepted."

The rulings of the court on the evidence, and the several charges given, are now assigned for error.

ELMORE & YANCEY, for the appellants.

WATTS, JUDGE & JACKSON, *contra*.

CHILTON, C. J.—1. The bill of exceptions states, that upon the trial in the court below, the defendant proposed to ask a witness on the stand "if there were not other ravines in the city which had increased in size for the last twenty years in as great a proportion as this ravine had increased;" that the court overruled the plaintiffs' objection to the ques-

tion, and allowed the witness to state that there were. The counsel for the appellee here insists, that the objection was to the question merely, and goes to its form, and not to the answer; but we think, if the inquiry was illegal and irrelevant to the issue in the cause, and was followed by an answer disclosing facts in response to it prejudicial to the plaintiffs, the question may as well be raised by an objection to the inquiry as to the answer.

2. As to the legality of the inquiry, we concur with the counsel for the appellants. We are unable to perceive what legitimate conclusion can be drawn from the washing of other ravines in the city wholly disconnected from this. If such proof were allowed, a number of collateral issues or questions would arise; for, as to each ravine which has been washed similar to this one, the plaintiffs would be allowed to show that there had been neglect or omission on the part of the city authorities to keep it in repair. Besides, there may have been various natural causes, operating with greater or less force, and calculated to produce different results: the character of the soil in different localities, the quantity of water, the swiftness of its flow in the different ravines, would, in a great measure, control the deepening or widening of them from washing. These are all lost sight of in the inquiry, which assumes that, because other ravines have increased in the same proportion with this, therefore the increase of this was not owing to the acts or omissions of the city council.

3. We do not regard the proof made by the brick-mason—namely, that he told one of the plaintiffs, if he built said wall in the ravine, it would fall by reason of the flood which washed by it—as altogether irrelevant. True, it has no very obvious connection with the issue, but, considered in connection with the other facts in the cause, it might tend to show a want of due caution, and a reckless temerity in locating the wall.

4. It is needless for us to discuss the propriety of the charges. It is very obvious, that the proof set out in the bill of exceptions fails to show either a tortious omission or breach of duty on the part of the defendant in respect of the injury complained of. The bill of exceptions says, "Upon this proof," the court gave the charges. Now, from anything which appears in the proof, the city council was under no obligation

to fill up or repair this ditch or ravine. It may have been required as an outlet for the water, and it may have been improper, if not impracticable, to have filled it up, or to have protected the wall erected by the plaintiffs. As to these matters, the bill of exceptions is silent. The ordinances passed by the city council are referred to; but we cannot judicially notice these. We can only look to the charter and the proof disclosed by the record; and, regarding these, we think the court might properly have charged the jury, that if they believed the proof, they should find for the defendant.

As the case must be remanded for the admission of the irrelevant proof first alluded to, we deem it unnecessary to notice the other points raised in the argument, and which will not probably again arise.

Let the judgment be reversed, and the cause remanded.

GILL *vs.* DOWNS.

1. When an attachment is sued out in a case not authorized by law, a motion to quash it is not the proper remedy, nor is the refusal to quash on motion revisable on error.
2. But if a motion to quash were proper in such case, the objection is waived by the failure to make it at the first term, and by afterwards appearing and pleading to the merits.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. JOHN E. MOORE.

THIS action (William W. Downs v. Samuel C. Gill) was commenced by original attachment, sued out against the defendant as a non-resident. At the term of the court to which the attachment was returnable, the plaintiff declared in covenant, to recover damages for defendant's breach of warranty of the soundness of a slave. At the next term, the defendant moved to quash the attachment, but his motion was overruled; he then pleaded to the merits, and judgment was rendered

against him on issue joined. He now assigns for error the overruling of his motion to quash the attachment.

R. O. PICKETT, for the appellant.

R. W. WALKER, *contra*.

CHILTON, C. J.—The only error assigned is, that the court refused the motion to quash the attachment. Such refusal cannot be questioned on error: neither is a motion to quash the remedy in such cases.—Jordan v. Hazard, 10 Ala. 221-6. But, if it were, the defendant waived it, by failing to make it at the first term of the court, and by afterwards appearing and pleading to the merits.—Burroughs v. Wright, 3 Ala. 43.

Judgment affirmed.

FARMER'S DISTRIBUTEES *vs.* FARMER'S ADM'R.

1. If an administrator, wishing to avoid the statutory requisition as to the payment of interest on the funds in his hands, makes affidavit that he always had on hand, or within his immediate control, a sum sufficient to pay the amount due by him as administrator," but does not deny that he used the trust funds, he is chargeable with interest.—Clay's Digest, p. 198, § 28; Code, § 1813.

APPEAL from the Court of Probate of Marshall.

IN the matter of the final settlement of the estate of Sarah Farmer, deceased, by Isham H. Fennell, administrator.

The said administrator, wishing to discharge himself from the payment of interest on the funds which he had received, made the following affidavit: "That he has always had on hand, or within his immediate control, a sum amply sufficient to pay the distributive shares of Freeland Farmer and Townsend Farmer; that the other distributees were paid off, at or before the same was received by affiant; that he has always been ready and desirous to pay the distributive shares of the other two, and has always been ready to pay the same, but

neither of them ever applied for it, nor had any guardian been appointed to whom he could pay it, known to affiant. Affiant does not pretend, or allege, that he has kept separate and apart the identical money of said estate, but has always kept himself prepared to pay the amount, and sent word to an uncle of the minors to become their guardian, that he might pay their shares. There was, also, a space of two or three years that affiant expected some one to be appointed their guardian."

On this affidavit, the distributees of the estate moved the court to charge the administrator with interest on the money which had come to his hands; but the court held the affidavit sufficient to discharge him from the payment of interest; to which ruling the distributees excepted, and they now assign it for error.

J. W. SHEPHERD, for the appellants.
LOUIS WYETH, *contra*.

GOLDTHWAITE, J.—We think the court erred, in failing to charge the appellee with interest on the amount of money shown to be in his hands as administrator, from the time it was received by him. The effect of the act of 1828 (Clay's Digest, p. 198, § 28), and of the Code (§ 1813), is, to render an administrator *prima facie* liable for interest, unless he discharges himself by making the affidavit required.—King v. Cabiness, 12 Ala. R. 598; Hollis v. Caughman and Wife, 22 *ib.* 478. In the present case, the appellee does not deny that he used the funds, but seeks to avoid the effect of the statutory requisition, by making affidavit that "he always had on hand, or within his immediate control, a sum amply sufficient to pay" the amount due by him as administrator.—This might be the case, and still he may have used the trust funds.

Let the decree be reversed, and the cause remanded.

DUKE'S ADM'R *vs.* DUKE'S DISTRIBUTEES.

1. The act of 1850, which provides (Pamphlet Acts 1849-50, p. 32, § 28) "that partial settlements, whether of executors, administrators, or guardians, shall on final settlement be considered as only *prima facie* correct," does not retroact upon settlements made before its passage.
2. If, on an annual or partial settlement made by an administrator under the act of 1843, all the proper parties being regularly before the court, an issue is made up respecting the validity of certain items, and fully tried by the parties before the court, the judgment given upon them, whether allowing or rejecting them, so long as it remains unreversed, is as conclusive as if rendered on final hearing, and may be pleaded in bar on the final settlement.

ERROR from the Court of Probate of Perry.

IN the matter of the final settlement of the estate of Jeremiah K. Duke, deceased, by John F. Shaffer, his administrator. The distributees of the estate attempted to charge the administrator with certain sums of money collected by him on account of his intestate's interest in certain mills, and issues were joined between the parties touching the validity of these items. "Before going into the trial on the merits, the defendant objected to said cause being tried on said issues, on the ground, that the identical same issues had been once before adjusted by said Orphans' Court, and decided in his favor; and he pleaded the same in bar of said court's further proceeding in said trial. In support of his objections, the defendant showed to the court, by the records of said Orphans' Court, that at a term of said court held on the 17th of January, 1848, an account which he had theretofore filed for a partial settlement of said estate, was objected to by the plaintiffs in this case, and the same issues were tendered by them which they now offer; that defendant joined issue with them; that the whole merits of the questions involved in the issues now tendered were then gone into and tried by the court; that witnesses were introduced and examined by both parties, in open court, touching their knowledge of the questions involved; and that upon the trial of said issues, said court gave judgment thereon in favor of the defendant, and then and there refused to charge him with said mo-

neys. But the court overruled defendant's objections, on the ground that said issues having been decided on a partial settlement of said estate, was not a bar to plaintiffs' right of action in this case, and did not preclude them from again seeking to charge said administrator with said moneys; and to this ruling of the court the defendant excepted."

This ruling of the court, *inter alia*, is now assigned for error.

I. W. GARROTT, for the appellants, contended that the previous decision of the court on the items involved in the present controversy, under the law then in force, was final and conclusive, and constituted a bar to their subsequent investigation on another settlement; and cited Savage v. Benham, 11 Ala. 49, and Thompson and Wife v. Hunt, 22 *ib.* 517.

JOSEPH R. JOHN, *contra*, cited and relied on the cases of Smith's Heirs v. Smith's Adm'r, 13 Ala. 329; and Thompson and Wife v. Hunt, 22 *ib.* 517.

CHILTON, C. J.—It appears from the bill of exceptions sealed in this case, that before going into trial on the merits, the defendant objected to going to trial upon the issues tendered, and pleaded in bar of such trial, that the same issues now tendered had been once before tried and fully determined by the Orphans' Court of Perry county, to-wit, on the 17th day of January, 1848; and in support of his plea, produced the record of said Orphans' Court in said cause, whereby it appeared that, at a term of said Orphans' Court held on the day above mentioned, the defendant having before that time filed his account in said court for a partial settlement, the plaintiffs objected to said account, *and the same issues were then tried, at their instance, which they now tender*; that the whole merits of the questions involved in the present issues were then gone into and tried by the court; that witnesses were examined by both parties, in open court, touching their knowledge of the questions involved; and that upon the trial of such issues as aforesaid, the said Orphans' Court gave judgment thereon in favor of the said defendant, and then and there refused to charge him with the said moneys with which he is sought to be charged by the issues now tendered. The

probate judge, however, ruled, that as the former trial was had on a partial settlement of said estate, it was no bar to a subsequent trial seeking to charge the administrator with the moneys from which by the previous trial he had been exonerated.

There is some confusion in our previous legislation, upon the subject of partial or annual settlements, and the effect to be given to them upon final settlements of estates; and this want of definiteness has given rise to some seeming conflict in the decisions of this court upon the subject.

Previous to the act of 1843, it was considered, that such settlements were not conclusive, and could only be regarded as *prima facie* evidence of their correctness upon a final settlement thereafter had. Those made under the act of 1843 were regarded by this court, in Savage v. Benham, 11 Ala. Rep. 49, as partaking of the nature of final settlements, so far as to authorize a writ of error to lie to this court. This decision was re-affirmed by us in Thompson and Wife v. Hunt, in 22 Ala. Rep. 517. The judge who delivered the opinion in the case last cited, supposed that Price v. Stewart, 16 Ala. Rep. 40, was opposed to this view; but it will be observed that it arose upon a guardian's annual settlement under a different statute, and does not in fact conflict with 11 Ala. 49.

The act of 1850 makes such settlements, in terms, interlocutory merely, and declares the effect to be given them upon a final settlement, to-wit, that they are to be regarded as *prima facie* correct, and liable to be corrected for any error, either law or fact. Hence, in Thompson v. Hunt, *supra*, the settlement having taken place since the 11th February, 1850, when that act was passed, came within its provisions, and it was held, that no writ of error could be prosecuted from such partial settlement.

If we concede that the result would be affected by the act of 1850, above alluded to, yet it is clear that it does not retro-act so as to affect settlements made before its passage. Such was not the intention of its framers. The settlement pleaded as a bar of the present controversy took place on the 17th day of January, 1848, and was made under the act of 1843, and must, consequently, be governed by that law as to its effect.

Without intending to decide that annual or partial settle-

ments may not be inquired into and corrected, as to any and all items which were not litigated when they were made, we feel quite sure that where such settlement was made under the act of 1843, and all the proper parties were duly brought before the court, and an issue respecting the validity of certain items of the account was made and fully tried by the parties before the court, the judgment given upon these items, either allowing or rejecting them, so long as it remains unreversed, must be of force, and as conclusive as if rendered upon the final hearing. The Legislature, by the act of 1843, evidently authorized such contestation; and there is nothing in the act itself, as there is certainly nothing in public policy, which authorizes the same parties, before the same court, to re-litigate the same matter upon issues which are identical, and, it may be, upon the same evidence. This can only be done upon granting a new trial, but never in another distinct contest.

If the recitals in the bill of exceptions in this case be true, as to the former trial, there is no question that it constitutes a bar to a re-trial of the same items, then fully contested, and determined upon by the court.

As this view will probably be decisive of the case upon another trial, we deem it unnecessary to notice the other questions raised upon the record.

Let the judgment be reversed, and the cause remanded.

COUCH ET AL. *vs.* ANDERSON.

1. Deed of gift of a slave, "to my daughter L. during her natural life, and at her death to her child or children; but, in case of the death of my said daughter without lawful issue of her body, then the said negro, and her issue or increase, *to return and belong to my other heirs*." *Held*, that the term "heirs" was a word of limitation, and not of purchase; and that therefore, upon the death of L. without issue, living the grantor, his other surviving children, who were born before the execution of the deed, took nothing under it.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. THOS. A. WALKER.

DETINUE by Robert Couch, John Couch, William Couch, Sidney Couch, William Baker and Eleanor, his wife, Harvey Hendrix and Margaret, his wife, Spencer Stegall and Mary his wife, Alexander Orr and Malinda, his wife, and William M. Jamison and Dorcas, his wife, against Harvey Anderson, for two negroes, a boy named Guilford, and a girl named Lucy.

The plaintiffs claimed under a deed of gift from their father, John Couch, dated in February, 1824, of which the following is a copy:—

"STATE OF SOUTH CAROLINA, } Know all men by these pre-
Pendleton District. } sents, that I, John Couch, of the same State and district, for and in consideration of the natural love and affection which I bear my daughter Lucinda, now the wife of Thomas Montgomery, have given and granted unto my said daughter Lucinda, during her natural life, and at her death to the child or children of my said daughter, a certain negro girl named Mary Eleanor, about seven years of age, together with the future issue and increase of the said slave; but, in case of the death of my said daughter Lucinda without lawful issue of her body, then the said negro girl, and her issue or increase, to return and belong to my other heirs. And I do hereby bind myself to warrant and defend the said negro girl, together with her issue or increase, to my said daughter Lucinda, as above mentioned, against myself, or any other person or persons lawfully claiming the same. Given under my hand and seal," &c.

On the trial of the cause, the parties entered into an agreement, by which they admitted these facts: That a copy of the deed might be used as the original, the due execution and delivery of which were admitted; that the grantee in said deed, Lucinda Montgomery, died in 1851, before the commencement of this suit, never having had any child or children; that the negroes sued for are the children of the negro girl mentioned in said deed; that said girl was sold in the lifetime of said Lucinda Montgomery, by the sheriff of Greenville district, South Carolina, to satisfy an execution against her husband; that notice of said deed was publicly

given at said sale, and that the defendant claims under said sale; that said deed was duly recorded in the proper office in South Carolina; that said John Couch, the grantor, is still living; that plaintiffs are the only living children of said John Couch, and were born before said deed was made: that the value of the negroes sued for is $500 each, and that defendant was in possession when the suit was brought.

"No other proof being offered than said agreement and deed, and there being no conflict in the proof, the court charged the jury, that if they believed the proof, they should find for the defendant; to which charge the plaintiffs excepted," and which they now assign for error.

WHITE & PARSONS, for the appellants:

By the terms of the deed, Lucinda Montgomery took an estate for life in the slave Mary Eleanor, and her child or children, if she had any living at her death, the absolute estate; but, if no such child was living at her death, or if she never had any such child, then, at her death, the property vested in the "other heirs" of the grantor.—Darden's Adm'r v. Burns' Adm'r, 6 Ala. 365; McGraw v. Davenport, 6 Port. 327; Powell v. Glenn, 21 Ala. 458; Flinn v. Davis, 18 *ib.* 132; Williams v. Graves, 17 *ib.* 62; Woodley v. Findlay, 9 *ib.* 716; Keating v. Reynolds, 1 Bay's R. 80.

The words "heirs" and "heirs of the body," when applied to personal estate, have been sometimes held to be synonymous with "children."—Jarman on Wills, 2d vol., m. p. 73; Powell v. Glenn, 21 Ala. 466; Doyle v. Bouler, 7 *ib.* 246; Fellows, Wadsworth & Co. v. Tann, 9 *ib.* 999; Williams v. Graves, 17 *ib.* 62; Dunn v. Davis, 12 *ib.* 135; Hodgeson v. Bussey, 2 Atk. 89; Wright v. Jesson, 5 M. & S. 98; Bowers v. Porter, 4 Pick. 208; Goodright v. White, 2 W. Black. 1010; Doe v. Lawson, 3 East's R. 278.

The strictness of the ancient rule, as to repugnancy in deeds, is much relaxed. The intention is to be gathered from the whole instrument, rather than from particular clauses seemingly repugnant.—McWilliams v. Ramsay, 23 Ala. 813; Hamner v. Smith, 22 *ib.* 433. The modern rule is, to give effect to the whole and every part of the instrument, whether it be a will, deed, or other contract—to ascertain the general

intention, and permit it, if agreeable to law, to overrule the particular.—Greenleaf's Cruise, vol. 4, tit. 32, ch. 12; Story on Contracts, § 659. In the construction of wills (and it is insisted, under the authorities above cited, that the same principle applies to deeds) the courts always look to the intention as the polar star to guide them.—Gulliver v. Poyntz, 3 Wils. 141; Smith v. Bell, 6 Peters 84.

A contingent remainder in personal property, after a life estate, may be created by deed.—Williamson v. Mason, 23 Ala. 488; Price v. Price, 5 *ib.* 580. The rule in Shelley's case enlarges the estate of the first taker, *only* when his heirs general, or the heirs of his body, take by descent from him, and not as purchasers. Here, the life estate of the wife vested in the husband and his heirs, and the line of legal descent is different from those who take under the deed; and the rule, therefore, cannot apply.—Cases cited above.

In regard to personal estate, it seems clear, that words denoting a failure of issue, following a bequest to children, refer to the objects of that gift.—2 Jarm. Wills, m. p. 363.

JOHN T. MORGAN, with whom was JOHN FOSTER, *contra*:

1. The deed speaks from the time of its execution, and must at that time define all the interests created by it. Even if the words "my other heirs" mean "my other children," it is uncertain whether the donor meant his other children then living, or those living at the death of the first taker without issue living at her death; and in this state of uncertainty, a well-settled rule of construction (Isbell v. Maclin, 24 Ala. R. 315) intervenes, and provides that they shall take as heirs, or by representation, and not by descent. In this state of uncertainty, it cannot be said that the deed creates and defines the estate which the other children would take.

2. In this view, also, it seems clear from the context, as well as from the use of the term heirs, that the donor intended, at the determination of the particular estate, (if an estate tail is not created,) that a reversionary interest would fall back to his estate, and would then pass to his other heirs, whoever they might be; for, doubtless, he expected that he would not survive his daughter and her children, and he provided accordingly.—Keyes on Chattels, §§ 59, 300.

3. The term "heirs," when used in a gift or bequest of personal chattels, always means "next of kin;" and to ascertain these, we must leave the deed or will, and look to the statute of distribution for the definition of the term. This proves that the "heirs" cannot take under the deed alone as purchasers, but under the statute by representation.—Eddings v. Long, 10 Ala. 203; Malcolm v. Taylor, 2 Russ. & M. 416; Kay v. Connor, 8 Humph. 624.

4. The remainder to the "heirs" of the donor, upon a contingency, might be good, because he might be dead when the particular estate determined; but, if it should happen that the donor is still living at the determination of the particular estate, then the limitation over is at end: like all other contingent remainders, it is defeated if the person intended to be benefited cannot take when the contingency happens.—2 Black. Com. p. 136.

5. The limitation over is void for uncertainty, and also for remoteness.—Dunn v. Davis, 12 Ala. 135; Keyes on Chattels, p. 136.

6. The donor seems to have studied to find terms which would avoid a *designatio personarum*, and to select words which would embrace indefinitely a class of persons who could take as heirs or as purchasers.

GOLDTHWAITE, J.—The only question presented on the record is, as to the construction of the deed executed by John Couch, by which he conveyed a negro to his daughter, a married woman, "for life, and at her death to her child or children; but, should she die without lawful issue of her body, then said slave to return and belong to my other heirs." It was admitted on the trial, that the plaintiffs below were the children of the grantor, born before the execution of the deed; that the daughter of the grantor died without having had any children, and that the grantor was still living.

Waiving the question, whether the words "child or children," used in the first part of the deed, are words of limitation, or of purchase, and conceding, for the purposes of the argument, that they are the latter, the question then is, as to the effect of the limitation over to the "*other heirs*" of the grantor. The word *heirs*, without explanation, is always

construed as a word of limitation, and must be taken as such in the present case, unless it is apparent from the other parts of the deed that it was used in a different sense. The argument on the part of the appellants is, that as by the terms of the deed, the daughter takes for life, and on her death without children, the property is to "belong to the *other* heirs" of the grantor, the use of the word "other" qualifies the general meaning of the term "heirs" to which it refers, and shows that the grantor did not intend to use that word in its ordinary sense, but applied it to persons standing to him in the same relation as his daughter. It is possible that the grantor meant this; but we think it more probable, from the use of the word "return," taken in connection with the words which immediately follow it, that, in the event his daughter died without children, his intention was, that the property designed for them should come back, and pass as if no conveyance had been made. Presuming, as was very natural, that he should die before his daughter, his first object was, to make provision for her during life, and at her death for her children; if, however, she should have no children, then the property designed for them was to return and pass to his other heirs. Such a disposition is in accordance with the feelings and affections of most men; and in expressing his intention, he merely expressed what the law would do. Our conclusion is, that there is nothing in the deed which shows that the word "heirs" was used in a different sense from that which the law ordinarily attaches to it, and being therefore a word of limitation, his children could not take under the deed.

Judgment affirmed.

HOWARD'S DISTRIBUTEES *vs.* HOWARD'S ADM'R.

1. Under the act of February 7, 1854, (Pamphlet Acts 1853-54, p. 24,) the probate court has jurisdiction, on the petition of the distributees of an intestate's estate, whose administrator has died without settling his accounts, to cite the personal representative of such deceased administrator, and have an account and settlement of his administration on the original estate, "as fully and completely" as could have been made by such deceased administrator himself, if alive; and the meaning of the proviso to the third section is, that the personal representative of the deceased administrator shall be personally liable on such settlement only to the amount of the assets of his intestate's estate which have come to his hands.
2. An appeal lies from a decree of the probate court, sustaining a demurrer to a petition filed, under the act of 1854, to compel a settlement from a personal representative of his intestate's administration on an estate, because of the failure to allege that assets of the first estate came to the defendant's hands; and dismissing the petition with costs, on the petitioner's declining to amend.

APPEAL from the Court of Probate of Madison.

The appellants, claiming to be the children and legal distributees of Robert Howard, deceased, filed their petition in July, 1854, for a citation against Robert L. Clark, as administrator of William Howard, deceased, to compel him to settle his intestate's administration on the estate of said Robert Howard. The petition alleged, that William Howard was appointed administrator of said Robert Howard's estate on the 16th November, 1840; that he died in 1845, having never made a final settlement of his administration on said estate; and that defendant had been appointed and qualified as his administrator. The defendant appeared by attorney, and demurred to the petition, "because said petitioners do not allege, in their said petition, that any assets belonging to the estate of said Robert Howard, deceased, ever came to the hands of this defendant." The court sustained the demurrer, and, on the petitioners' declining to amend, "ordered and adjudged that said petition be dismissed, at the cost of the petitioners' next friend." From this order the present appeal is prosecuted, and the decree is assigned for error.

ROBINSON & JONES, for the appellants:

The act of February 7, 1854, exactly covers the case made

by the petition. The first section, in express terms, confers jurisdiction on the Probate Court to compel the defendant, as administrator of William Howard, to settle his intestate's administration on Robert Howard's estate. The object was, not to reach the defendant, and hold him responsible for the property of Robert that might find its way into his hands, but to make him settle William's administration. The act of 1854 is an exact copy of the act of 1845, which was construed by this court in Jenkins v. Gray, 16 Ala. 104, and again in 24 *ib.* 517. The object of the act will be entirely defeated, in many cases, if the ground taken in the demurrer is sustained. Much stress is laid on the proviso to the third section, "that the administrator shall only be liable for the assets which may come into his hands"; but the clear intention of this was, to limit the personal liability of the defendant to the amount of assets which have come to his hands from the estate of his intestate. The assets of the estate of Robert Howard could never legally go into the hands of this defendant, but into the hands of an administrator *de bonis non*.—Chamberlain v. Bates, 2 Port. 557. This administrator could not get possession of any of the assets of Robert Howard, without committing a breach of law; and if he had obtained such possession, he would be liable, in a common-law action, to the administrator *de bonis non*. According, then, to the construction contended for by the appellee, the Probate Court could only acquire jurisdiction by the trespass or tort of the defendant.

That an appeal lies from the order of the court, dismissing the petition, &c., see Code, § 1888.

BRICKELL & CABANISS, *contra*:

1. The appellee submits to a motion to dismiss the appeal, because the judgment of the court, sustaining the demurrer to the petition, is not a final order or decree from which an appeal will lie. By that judgment, the court merely refuses to compel a settlement, and this refusal cannot be revised on appeal.—Shadden v. Sterling, 23 Ala. 522; 20 *ib.* 185.

2. If this motion should be overruled, then it is insisted for the appellee, that the judgment is correct. The act of 1854 gives the Probate Court the jurisdiction which was invoked by the petitioners, but the proviso to the third section limits

the defendant's liability "to the assets that may come into his hands." In construing the act of 1846, of which the act of 1854 is a literal copy, this court say, that the remedy provided may "extend the assets of the first estate unadministered, *but it could go no further.*"—Gray v. Jenkins, 24 Ala. 516.

CHILTON, C. J.—The act of 7th February, 1854, authorizes the distributees of an intestate, in cases where the administrator has died, to call in the personal representative of such deceased administrator before the Probate Court, and have an account taken and settlement made between the estate and the deceased administrator, "as fully and completely" as could have been made by the deceased administrator were he alive. It is provided, however, by the third section of that act, that such executor, administrator, &c., shall only be liable for the assets that may come into his hands.

In Gray v. Jenkins, 24 Ala. 516, it was said, that the object of such enactment was, to afford the Probate Court the means of reaching the estate of the first executor, or administrator, in the hands of his personal representative, and perhaps the remedy would extend to the assets of the first estate unadministered, &c. The act of 1844-5, here construed, was not essentially variant from the act of 1854, now under consideration. It could not have been the design of the Legislature, to limit the account and settlement merely to the unadministered assets of the first estate which may have gone into the hands of the personal representative of the administrator of such estate. This would, in most cases, defeat the avowed object of the act, which was, to enable the court to effect a complete settlement in this summary way. Besides, the representative of the first administrator has no right to take the property of the estate upon which his intestate administered, and if he were to do so, he would be liable to an action at the suit of the administrator *de bonis non* of that estate.

The meaning of the proviso to the third section of the act of 1854, is, that the representative of the first administrator shall not be held personally liable beyond the assets which may have come to his hands,—assets of the estate which he represents, and such as he had authority to reduce to possession and administer,—of his immediate intestate.

Had this proceeding been instituted to obtain distribution, under the law as found in the Code, the petition would have been defective, as it fails to specify the share to which the applicants are entitled, or that the assets are more than sufficient to pay the debts, as provided in section 1779. But the application is for a settlement of the first estate, under the act of 7th February, 1854, by the children of the intestate, who are his distributees, and substantially conforms to that act. The court, therefore, improperly sustained the demurrer to the petition.

But it is said that this application may be renewed at any time,—that there is no final decree, nor any such consideration or judgment of the court, as under the existing law will authorize an appeal.

There are cases in which no appeal lies from the refusal of the court to proceed to compel settlements. Such are some of the cases cited by the counsel who moves to dismiss this appeal. In these cases, the court, for reasons deemed sufficient, postpones the settlement or distribution, but makes no final order concluding the rights of the petitioners. Here it is different. The court, in deciding upon the demurrer, adjudges that, unless the petitioners will aver (and, of consequence, prove) that assets of the estate of Robert Howard came to the hands of Clark, the administrator of Wm. Howard, the court had no power to compel him to make the settlement; and for want of such averment, their petition is dismissed, with cost. We think, that under our previous decisions, this is such a judgment as authorizes an appeal. A judgment on demurrer to a declaration is so far regarded as a judgment on the merits, as to be a good bar to an action founded on the same allegations.—Perkins v. Moore, judge, &c., 15 Ala. 17. The case before us falls within the principle of the decision of McDaniel v. Whitman, in which we refused to dismiss.—See 15 Ala. 343.

Let the judgment be reversed, and the cause remanded.

ALLEN *vs.* HARPER.

1. Under a written contract between an overseer and his employer, whereby the latter agrees to give the former for his services "three-sixteenths of all the cotton raised on the place, and to gin and haul his cotton, with his own, free of charge," the overseer is entitled also to three-sixteenths of the cotton seed, and is a co-owner with his employer both in the cotton and the seed, until a division is made between them; but a delivery of the cotton, after ginning, would not operate as a delivery of the seed.
2. When the judgment entry recites, that the parties appeared by their attorneys and a trial was had on issue joined, while no complaint is found in the record, it will be presumed, on error, that the complaint was either dispensed with, or lost; and if the evidence set out in the record is sufficient to sustain an action in tort for the conversion of the property sued for, but not sufficient to support an action *ex contractu*, it will be presumed that the action was in tort.
3. In an action to recover damages for the conversion of a chattel, if the plaintiff is the several owner, he would be entitled to recover upon proof of a demand and refusal; but if his interest had never been separated, he could not recover against a co-owner, without proving also that the conversion went to the destruction of the chattel, or the exclusion of his right.

APPEAL from the Circuit Court of Perry.
Tried before the Hon. THOMAS A. WALKER.

THIS action (Benjamin G. Harper v. William Allen) was commenced before a justice of the peace, whose summons describes the action as "a plea of debt under fifty dollars due by account." The justice rendered judgment for the plaintiff, from which the defendant appealed to the Circuit Court.—The record does not show that the plaintiff there filed any statement, or complaint; but the judgment entry recites, that "the parties came by their attorneys, and thereupon, issue being joined, came a jury," &c., who returned a verdict for the plaintiff, assessing his damages at $34 67.

The defendant's bill of exceptions states, that the plaintiff, on the trial, read in evidence to the jury, after proving its execution, an instrument in writing in these words:

"Articles of agreement, entered into this the 8th day of December, 1851, between B. G. Harper, of the first part, and Richard Lee, of the second part. First, the said Benj. G.

Harper does hereby obligate himself to attend to the said Richard Lee's business as an overseer, during the year 1852, to the best of his ability. Second, the said Richard Lee does agree to give the said B. G. Harper full control, so far as the management of the slaves is concerned, but reserves to himself the right to have a voice in the management of the crop. Furthermore, the said Richard Lee agrees to furnish the said B. G. Harper with seven good hands, and all the necessary implements used in farming, and to pay him three-sixteenths of all the cotton, corn and fodder made on the place during the year 1852; and agrees, furthermore, to board, wash and furnish the said Harper with a horse to ride on Sabbath days, clear of any charge for the same; he agrees, also, to gin and haul the said B. G. Harper's cotton, with his own, clear of charges. These articles of agreement we, the undersigned, have this day entered into, in witness of which we hereunto affix our names. (signed) Benjamin G. Harper,

Richard Lee."

"The plaintiff then proved, that he complied with said agreement on his part, and raised on said Richard Lee's farm, with the means furnished him under said agreement, a crop of corn and cotton in the year 1851; that the cotton was duly gathered, and ginned, and packed, without any division; that as said cotton was ginned, the cotton seed were in part put up in the gin-house, and in part thrown out in a pile by said gin-house, but that said cotton seed were at no time divided between himself and said Richard Lee, and that three-sixteenths thereof were not divided and delivered to him; that fifteen of the forty-five bales of cotton which were raised on said farm were marked in plaintiff's name, and delivered to him after they had been ginned and packed; that three-sixteenths of the cotton seed, ginned out of said forty-five bales of cotton, amounted to three hundred and twenty bushels, and that the same were reasonably worth ten cents per bushel; that about the 26th or 27th December, 1851, and again in February, 1852, he demanded his said three-sixteenths of said cotton seed from the defendant, who, in the fall of the year 1851, bought the plantation of said Lee, with his stock of mules, horses, cows, and other property, and went into possession of the same, and also of the said cotton seed, about three or four

weeks before the 25th December, 1851; that defendant refused to deliver said seed to said plaintiff, but agreed with him that he was willing to leave it to some of their neighbors, whom they selected,—then that he was willing to do what was right about it, and the day to arbitrate was appointed; that plaintiff attended, with the arbitrators, but that defendant failed to attend, and sent no excuse.

"The defendant then showed, that said cotton seed were on said plantation when he obtained the possession thereof from said Lee, and that he had no notice of said plaintiff's claim to three-sixteenths of the same until plaintiff demanded them on said 26th or 27th December, 1851; but it was in evidence, that defendant knew that plaintiff was living with Lee for three-sixteenths of the crop, but he had no notice of plaintiff's claim to the cotton seed until plaintiff demanded it of him. It was in evidence, also, that said cotton seed were never actually divided between plaintiff and said Richard Lee, and that plaintiff was not placed in possession of his share thereof; and that defendant used said seed in planting his crop in 1852, and in manuring his land. Defendant offered testimony, also, going to show that the term cotton meant cotton lint, and did not embrace cotton seed, but the proof on this point was conflicting. It was proved, also, that said cotton seed were on said plantation when defendant obtained possession thereof; and that plaintiff had received his share of the corn and fodder. Plaintiff did not offer any proof to show a delivery of the cotton seed, except the delivery of said fifteen bales of cotton.

"On this evidence, the court charged the jury:—

"1. That the term cotton, mentioned in said written agreement, embraced the cotton and the cotton seed.

"2. That if they believed that as much cotton was delivered to plaintiff, after the same was ginned and packed into bales, as amounted to plaintiff's share as shown in said agreement, that was, in law, a sufficient delivery also of the cotton seed, and would vest in plaintiff a sufficient title to authorize him to maintain this suit for their value."

The defendant excepted to these charges, and asked others, which it is unnecessary to notice.

No errors are assigned on the record.

I. W. GARROTT, for the appellant.

JOSEPH R. JOHN, *contra.*

GOLDTHWAITE, J.—By the agreement made between the appellee and Lee, the former was to receive for his services "three-sixteenths of all the cotton made on the place", &c.; and if the agreement had stopped there, it might have been doubtful whether Harper would have been entitled to any portion of the cotton seed. But it is rendered certain by the last clause, by which Lee agrees to gin the cotton for Harper free of expense. This shows that the cotton was to belong to the latter before it was ginned, and, as the ginning was free of charge, the seed would belong to the owner of the cotton. The agreement being in writing, it devolved on the court to construe it; and as the construction given was in conformity with the views we have expressed, there was no error.

We think, however, that the charge that the delivery of the cotton operated as a delivery of the seed, was erroneous. It is clear that, under the terms of the contract with Lee, Harper was a co-owner with him both in the cotton and the seed, until their interests were divided. In the process of ginning, the lint and seed were separated, and the two became as essentially distinct as cotton and corn, and the severance of the share which the appellee had in the one would not necessarily be a severance of his interest in the other. That would remain in the same condition as before the cotton was divided.

But it is urged, that no injury was done to the appellant by this error. No statement or complaint is found in the record; but, as it appears that the parties appeared by attorney, we are authorized to presume, that it was dispensed with, or lost.—Bancroft v. Stanton, 7 Ala. 351. Giving the most favorable construction to the evidence set out in the bill of exceptions, it would not sustain a complaint *ex contractu*, for the reason, that although it tends to show a conversion, there is nothing conducing to prove that the wrong-doer sold, or converted the property into money.—Crow v. Boyd, 17 Ala. 51; Bohannon v. Springfield, 9 *ib.* 789. If we suppose the complaint was *in tort*, to recover damages for the conversion,

then, under the charge, the jury might have found in favor of Harper, if his undivided interest in the seed was severed by the delivery of the cotton; while if he was simply the co-owner, the law, to sustain the action against his companion, would have required him to go further, and prove that the conversion went to the destruction of the chattel, or the exclusion of his right.—Parminter v. Kelly, 18 Ala. 716. The effect of the charge was, to place the appellee before the jury in the more favorable position of the several owner of the thing converted, and thus enable him to recover upon a demand and refusal, which might not have been sufficient if the other party was the owner in common with him.

Judgment reversed, and cause remanded.

JOLLEY *vs.* WALKER'S ADM'RS.

1. Plaintiff having agreed with S. & P., who were mail contractors, to keep their drivers and horses at a stipulated sum per annum, payable quarterly, and during the last quarter, on their becoming insolvent, having refused to keep their drivers and horses without security, thereupon defendant, at the request of S. & P., wrote to plaintiff, saying "I will see you paid for this quarter, as their time then expires, payable when due in Alabama bank-notes"; plaintiff kept the drivers and horses until the expiration of the quarter, and the agent of S. & P. afterwards closed their account by giving the note of the surviving partner, payable one day after date, which was filed as a claim against the estate of the deceased partner: *Held*, that defendant's promise was an original undertaking, upon a new and sufficient consideration, which, upon its acceptance by plaintiff, discharged the debt of S. & P., and bound defendant to pay, at the expiration of the quarter, in Alabama bank-notes.

ERROR from the Circuit Court of Madison.

Tried before the Hon. THOMAS A. WALKER.

ASSUMPSIT by the administrators of Jeremiah W. Walker, deceased, against Benjamin Jolley, on the following cause of action, as endorsed on the writ: "That in and before the year 1842, Messrs. Stokes & Purdom were contractors of a mail stage line, upon which the said Jeremiah W. Walker in

his lifetime lived; the defendant, on the 16th day of April, 1842, by his written instrument of that date, promised the said Walker, who was then living, that he would see the said Walker paid for keeping the horses and drivers of said Stokes & Purdom for that quarter; the said Walker accordingly kept said horses and driver for and during that quarter, the reasonable value of which was $500, which sum has never been paid, either by said defendant, or by said Stokes & Purdom." The defendant pleaded, *non assumpsit*, no consideration, failure of consideration, set-off, and accord and satisfaction.

On the trial, the plaintiffs first read in evidence to the jury a letter, of which the following is a copy:—

"Huntsville, 16th April, 1842.

"Mr. J. W. Walker: Sir—Mr. Purdom spoke to me some few days ago to write to you that I would see you paid for keeping Stokes & Purdom's horses and drivers for this quarter; and I met with a misfortune to get badly hurt, and have not been able to do anything before now. I will see you paid for this quarter, as their time then expires; payable, when due, in Alabama bank-notes.

"Yours, Benj. Jolley."

The plaintiffs then read the deposition of Jeremiah S. Calvert, who testified, in substance, to these facts: That in 1842 he was acting as agent for Stokes & Purdom on their stage line between Courtland and Tuskaloosa, in procuring suitable stands and provisions for their horses and drivers; that as such agent, he made a contract for them with said J. W. Walker, whereby said Walker agreed to furnish such things as were necessary for their horses and driver, and he agreed to pay said Walker $900 *per annum* for so doing; that said Walker became uneasy about the last quarter, and required security, whereupon Benjamin Jolley wrote to him, telling him that he would see it paid on the 30th June, 1842, at which time the last quarter ended; that on the 13th July, 1842, witness, in passing Walker's house, called on him, and closed the accounts between him and said Stokes & Purdom, by giving their note for the amount due, payable one day after date; that he has since seen this note on file as a claim against the estate of said Stokes.

The plaintiffs further read in evidence the following writ-

ten admissions: "It is admitted, that said note was executed in Walker county at the distance of about one hundred miles from Huntsville, the residence of said Purdom; that said Calvert would swear, if here, that it was written by him, that no extension of the time of payment was asked, that he gave the note merely to close the account, and that it was always his custom, in settling accounts, to give notes in that form; that the firm of Stokes & Purdom was composed of Henry Stokes and Richard B. Purdom; that Stokes died in February, 1842, insolvent, at which time Purdom was also insolvent; and that Calvert, as the agent of Stokes & Purdom, was in the habit of giving notes for them on the line."

The plaintiffs then read the deposition of said Richard B. Purdom, who testified, that "the guaranty on which this suit is brought, was given to secure said Walker for keeping said Stokes & Purdom's stage horses and drivers, from the date of the guaranty up to the 1st July, 1842; that at the time it was given, the estate of said Stokes was thought to be unable to pay its debts, but witness thought that he had enough to pay the debts of the firm, but soon afterwards found out that he was mistaken; that said guaranty was given, because said Walker would not agree to keep the said horses and driver, unless witness would get some person to agree to see him paid; that he does not recollect of any particular inducements which caused Jolley to give the guaranty"; that the contract with Walker was made by Calvert, as the agent of Stokes & Purdom, and witness understood from him "that it was at the rate of $900, payable quarterly;" that the last quarter, mentioned in Jolley's letter, expired on the 1st July, 1842, and Walker continued to keep the horses and driver until that time.

The defendant then read to the jury the note spoken of by the witnesses, which was signed, "Richard B. Purdom, surv. part. of Stokes & Purdom, by J. S. Calvert, agent," and was in these words:

"One day after date I promise to pay Jeremiah W. Walker the sum of two hundred and eighty-seven dollars and one cent for feeding teams and drivers on Courtland line for the quarter ending 30th day of June, 1842, this 13th day of July, 1842."

This was all the proof offered in the cause; and the defendant then asked the court to charge the jury,—

"1. That the defendant's promise, as shown by said letter, was an undertaking to pay the debt of another; which charge the court refused to give, and the defendant excepted.

"2. That the contract between Walker and Stokes & Purdom, as shown by Calvert's deposition, was an entire contract, and being entire, that Walker was bound to perform his part of it, whether Stokes & Purdom ever paid him or not. This charge the court gave, but said to the jury, that if they believed from the evidence that the compensation was to be paid quarterly, and that Walker had refused, without security, to keep the horses for the quarter immediately succeeding the guaranty, then the defendant was liable on his guaranty"; and to this qualification of the charge the defendant excepted.

"3. That if they believed from the proof that there was no other consideration for defendant's said promise than the said contract between Walker and Stokes & Purdom, said contract was not such a consideration as would bind defendant to pay the debt to Walker; which charge, also, the court refused to give, and the defendant excepted.

"4. That if they believed that Walker, after the expiration of the contract between him and Stokes & Purdom, took said Purdom's note, as shown in Calvert's deposition, this discharged defendant; which charge, also, the court refused to give, and defendant excepted.

"5. That if defendant's promise was a guaranty, then plaintiffs must show that Walker notified Jolley that he accepted it; which charge, also, the court refused to give, and the defendant excepted.

"6. That the taking of Purdom's note by Walker, as shown by the proof, was an extension of the time of payment of the debt of Stokes & Purdom, and discharged defendant; which charge, also, the court refused to give, and the defendant excepted.

"The court charged the jury, that, to make a good consideration, a benefit need not accrue to the defendant—that it is sufficient, if a benefit accrued to Stokes & Purdom, at the defendant's instance: to which charge, also, the defendant excepted."

The charges given, and the several refusals to charge as requested, are now assigned for error.

ROBINSON & JONES, for the plaintiff in error:

I. The first charge should have been given—

1. Jolley's promise was, to pay or answer for the pre-existing debt or liability of Stokes & Purdom to Walker. This is established by the terms of Jolley's letter, the testimony of Calvert and Purdom, and by the conduct of the parties at and after the transaction. If we could so far distort the bill of exceptions, as to conclude that the promise of Jolley was coeval with the contract of Stokes & Purdom, it would still be a collateral promise, because the bill of exceptions shows that it was made in aid of one by Stokes & Purdom, and that the latter were regarded and treated as the primary debtors; and the rule of law, in such case, is, that if Stokes & Purdom were regarded as debtors at all, and were at all looked to by Walker for payment, then any promise of Jolley's, on the same consideration, though made at the same time as their contract, would be collateral.—3 Stew. & Port. R. 213; McKenzie v. Jackson, 4 Ala. 230; Leonard v. Vredenburg, 8 John. R. 29. The language of the letter, "I will see you paid," indicates a collateral promise.—Cahill v. Bigelow, 18 Pick. 369; Nelson v. Boynton, 3 Metc. 396; Newell v. Ingraham, 15 Verm. 422.

2. All the evidence in the cause, or nearly all, was offered by the plaintiff below, and is embodied in the bill of exceptions. In reference to this point, there is no conflict in it. The defendant, therefore, clearly had the right to have the legal effect of his letter in reference to the other testimony in the cause expounded to the jury.—Earbee v. Craig, 1 Ala. 607; Long v. Rogers, 17 Ala. 540. And when the court refuses to construe written testimony, when it should, and improperly leaves the question to the jury, injury will be presumed, and the cause reversed, whether the injury be evident or not.—Long v. Rogers, 17 Ala. 540; Ex'rs of Robertson v. Allen, 6 Ala. 106. In this case several important grounds of defence depended on whether Jolley's promise was collateral or primary, and upon this point the jury might very readily go astray; for, if the jury erroneously concluded that the promise was primary, there was an end of this branch of the case; while, if his promise was collateral, then other considerations had to be determined before a verdict could be agreed upon—

such as, whether the contract and promise were cotemporaneous, the consideration of the contract, &c. &c.

II. The qualification to the second charge cannot be sustained. It assumes that Walker had a right to annul his *entire* contract at pleasure, and that an additional promise, in aid of the original, made in order to prevent a breach of it, would be obligatory. The question as to the effect of a *new* contract, made after the old one had been forfeited and abandoned, is not presented. One witness says, Walker was to keep the teams and drivers for one year, ending on the 30th of June, for $900, and "that said Walker became uneasy about the last quarter of said contract, and required security," &c. The other witness says, he first made the contract, and he understood from him that Walker should keep the teams for one year ending at the same time, for $900, payable quarterly; and that "Walker would not agree to keep said horses and drivers, unless he, the witness, got some one to see him paid." But it does appear that Walker had performed his contract for three quarters, and half a month of the last quarter, and was still keeping teams and drivers when the letter was written. A promise to pay or guaranty the debt or liability of another previously existing, must not only be in writing under the statute of frauds, but, to be binding, must be upon some new consideration.—Theobald on Prin. and Sur., 5, § 10; Chitty on Cont. 51a, 52; Bealle & Co. v. Ridgway, 18 Ala. 118. And the law is the same, if the person to whom the collateral promise is made has actually given the credit by agreement, and partly, though not entirely, executed what by the contract devolved on him.—Theo. Prin. and Sur. 5, § 10; Jackson v. McKenzie, 7 Ala. 791; Newell v. Ingraham, 422; Tileston v. Nettleton, 6 Pick. 509; Larson & Sanders v. Wyman, 14 Wend. 247. This charge is, therefore, erroneous as a legal proposition, and being affirmative, injury is presumed.—Moore v. The State, 18 Ala. 532. It is equally erroneous when applied to the facts of this case; and it may be considered in reference to the facts of the case.—Waters v. Spencer, 22 Ala. 466. The proof also showed that there was no quarter immediately succeeding the guaranty, but that at least one-sixth of the last quarter had then passed. This charge was, then, according to the court's own principles, erroneous,

if intended to relate to the whole current quarter; and if intended to apply alone to the unexpired portion of the quarter, was eminently calculated to mislead the jury.—Waters v. Spencer, 22 Ala. 466.

III. From what has just been said, and the authorities just cited, the court erred in refusing the third charge. It is conceded that the contract between Stokes & Purdom and Walker would have been a sufficient consideration for Jolley's promise or guaranty, if the promise or guaranty had been made contemporaneously with that contract; but the bill of exceptions shows that that was not the fact.

IV. The fourth charge ought to have been given, and also the sixth—1. The taking of a promissory note for a pre-existing debt, is a conditional payment at the least, and suspends the right of action until the maturity of the note.—Story on Contracts, 812, § 979. Walker's right of action, then, was suspended for the period of two days, the day on which the note was given, and the day on which it was due.—Randolph v. Cook & Ellis, 2 Port. 286; Sanders & Harrison v. Ochiltree, 5 Port. 73. The surety has the right to stand on the precise terms of his contract, and is discharged if those terms be altered without his consent, whether the alteration consists in the amount of the obligation, or the time or manner of performing it; and this, whether he is injured by the change or not.—Comegys & Pershouse v. Booth & Bell, 3 Stew. R. 14; McKay & McDonald v. Dodge & McKay, 5 Ala. 388; Hayden v. Brown, 18 Ala. 643.

V. In the qualification of the second charge, the judge characterized the promise of Jolley as a guaranty, and gave effect to it as such. It was also so characterized by the plaintiff below in his interrogatories, and by witness Purdom in his answers. Hence the defendant very properly and pertinently asked the fifth charge—that if it was a guaranty, then Walker ought to have notified Jolley of its acceptance. The court having refused to determine whether Jolley's promise was to pay the debt of another or not, this was the most favorable form, for the other side, in which the charge could have been asked. The contract of guaranty, like all other contracts, requires both a proposal and acceptance.—Story on Contracts, 727, § 853; Martin v. Black's Executors, 21 Ala. 728. Nor

will a guaranty be binding on the guarantor unless he is notified by the guarantee that the offer is accepted.—Lawson v. Towns, Oliver & Co., 2 Ala. 375; 2 Stark. Ev. 648; Douglass v. Reynolds, 7 Peters 114; same case, 12 Peters 504; Lee v. Dick, 10 Peters 483; Chitty on Contracts, 11. But this principle is not confined to letters containing guaranties. Any proposition by letter is not obligatory until accepted, and the writer is notified of its acceptance.—Martin v. Black's Ex'rs, 21 Ala. 728. The defendant, then, might have asked the charge without restricting it to propositions to guaranty; but the restriction could not affect his right to the charge. The greater embraces the less, and as it would be true of propositions by letter generally, it must be true of propositions to guaranty, which are but one species.

VI. The seventh charge is equally erroneous.—The charge must be construed with reference to the evidence in the cause. Waters v. Spencer, 22 Ala. 466. Now the effect of this charge is, either that as a question of fact Jolley's promise was cotemporaneous with the contract of Stokes & Purdom, or that the original contract of these parties was a sufficient consideration for the subsequent collateral promise. In the first aspect, it was erroneous, 1st, because untrue in point of fact, and, 2d, because it was an invasion of the province of the jury. In the second aspect, it is erroneous, because, as we have seen, the consideration moving between the original parties, is only a sufficient consideration for the collateral promise, when the contract and promise are cotemporaneous. Theo. on Prin. and Sur. 5, § 10; Chitty on Cont. 51a, 52; Bealle & Co. v. Ridgway, 18 Ala. 118; Martin v. Black's Executors, 21 Ala. 728.

L. P. Walker and Robt. C. Brickell, *contra*:

1. Jolley's promise is not "an undertaking to pay the debt of another." It is a direct, unconditional promise to pay money at a certain time. That a third person may be liable to the same extent, upon the same consideration, and receives the benefit, does not make the contract "an undertaking to pay the debt of another." Any number of persons may be bound by a joint, or a joint and several promise, though the consideration moves to one only. The obligation of such a

contract is common to all, and being so, though the parties may between themselves sustain the relation of principal and surety, it cannot be termed "an undertaking" by any one to pay the debt of another. The promise is, not to be answerable if the principal makes default, but that each and all the principals will perform.—De Wolf v. Rabaud, 1 Peters 500; Townsley v. Sumrall, 2 *ib.* 181; Wainwright v. Straw, 15 Verm. 215.

2. The promise was upon a sufficient consideration and valid. Martin v. Black, 21 Ala. 721. The promise being reduced to writing, it is not necessary that the consideration should be a benefit to the promisor.—*Ib.* Being reduced to writing, it is valid, if founded on a legal consideration, whether such consideration be a benefit to the promisor, or an injury to the promisee.—*Ib.* It is only where the promise is not reduced to writing, that the consideration must be a benefit to the promisor.—*Ib.* An assent by one of the parties to a contract, to go on and perform it, on the faith of a promise of payment, given by a third person, is a sufficient consideration to support the promise.—Fox v. Barber, 2 E. C. L. 386; Edge v. Frost, 16 *ib.* 199; Sinclair v. Richardson, 12 Verm. 33; King v. Despard, 5 Wend. 277.

3. One cause of action cannot be extinguished by the substitution of another of the same degree, unless it is done by way of accord and satisfaction, which requires a distinct and executed agreement between the parties, and cannot be implied by the law, in the absence of such agreement.—2 Amer. L. C. 179. Walker's acceptance of the note made by Calvert as agent of Stokes & Purdom, implied no agreement to postpone his remedy upon Stokes & Purdom's indebtedness to him. It operates only as a new and collateral security for the same debt.—Elwood v. Deifendorf, 5 Barb. 408; U. States v. Hodge, 6 How. 282. A bill or note, given for a precedent debt, is not a payment, unless expressly agreed to be so.—Trotter v. Crockett, 1 S. & P. 446; S. C., 2 Por. 401; Abercrombie v. Moseley, 9 *ib.* 150; Tobey v. Barber, 5 Johns. 68.

A promissory note given to a creditor, if it is not intended by the parties as a payment, shall not operate as such.—Maneely v. McGee, 6 Mass. 143; Emerson v. Prov. Hat Man. C., 12 *ib.* 237; Vancleef v. Therrasson, 3 Pick. 12, cited and approved in 10 Ala. 756, (766). See Calvert's deposition, where

he says this note was given merely to close the account. It is clear that giving a note which proves to be an insufficient security, does not discharge the original debt.—10 Ala. 767, and cases cited. (The proof shows that Stokes & Purdom were insolvent when the note was given). The taking of the note of Stokes & Purdom did not discharge Jolley.—Norton v. Eastman, 4 Greenl. 521; Babcock v. Bryant, 12 Pick. 134; 12 Mass. 154. The measure might be an advantage, but could not be an injury to the defendant. If the note was a payment of the account, as between the plaintiff and Stokes & Purdom, it cannot have this effect, in relation to the defendant, who has no connection with either the account or the note, and whose guaranty depends upon neither for its obligation.—4 Greenl. 525. Jolley undertook to see the plaintiff paid, and whether the plaintiffs' demand was evidenced by an account or a note, he was bound to "see it paid." It was a mere exchange of securities—an account for a note—having no connection with the defendant's contract. He agreed to see the plaintiffs paid for keeping the horses, and he has not done so.—*Ib.*

4. The failure to give the defendant notice of the acceptance of the guaranty, constitutes no defence.—4 Greenl. 526; 12 Pick. 135; 2 American Leading Cases, 84. This was not a mere proffer to guaranty, as was the case of Martin v. Black, 21 Ala., *supra;* but it was absolute in its terms, and definite as to its extent; and in such cases no notice to the guarantor of acceptance is necessary.—4 Greenl. 526, *supra*. It will be found that all the cases seemingly against this position, were cases in which there were general letters of credit, addressed to no particular person, or in which a future credit was to be given to the person in whose favor the guaranty was drawn, or there was a mere overture to guaranty.—12 Peters 207; 10 *ib.* 482; 7 Cranch 69; 1 Mason 323; Croft v. Isham, 13 Conn. 28. See all the cases collected and commented upon, in 2 American Leading Cases, from 62 to 101.

The case of Douglass v. Reynolds, 12 Peters, was the case of letters of credit, of future and contingent sales or advances. Such, also, were the cases of Clark v. Russell, 7 Cranch 69, (92); Adams v. Jones, 12 Peters 49, and Edmonson v. Drake, 5 *ib.* 624. In none of these cases was the liability of

the guarantor fixed by the terms of his contract, but was left open for determination by the person to whom the guaranty is given. And in all such cases, the general rule certainly is, that the party on whose option it is dependent for certainty, must give notice how that option is exercised.—2 A. L. C. 63-69. But there can be no room for the application of the doctrine of notice in this case, which only holds good where the liability imposed on the defendant is uncertain in itself, and cannot be reduced to certainty without recourse to information lying more particularly within the knowledge of the plaintiff.—2 A. L. C. 65. Here the person to whom the liability of the guarantor was to enure is clearly designated; so, also, is the period of liability, and the time of payment,—and the only item unnoticed in the guaranty, is the amount he is to pay. But this had already been fixed by the contract between Purdom & Stokes and Walker, and must have been communicated by Purdom to Jolley, at the time Purdom requested him to execute the guaranty. The object of notice of acceptance is, to let the guarantor know the extent of his liability; and if necessary be enabled to take the proper steps to secure himself.—2 Ala. 375. But where he already knows, or has the means of knowing, at the time of the guaranty, there is no reason whatever for the rule requiring notice. Jolley's guaranty was of a subsisting liability, and was as fully known to him, through Purdom, as to Walker himself.

In Weaver v. Wood, 9 Barr 220, it was held, that a party who is induced to adopt a particular course of conduct, by an express promise of compensation, may recover on the promise, without having given any other evidence of his assent to the contract, than by acting under it. And as persuasive to show that this is the true rule, the precedents of declarations on guaranties contain no allegation of any notice of acceptance, but are simply limited to a statement of the undertaking of the defendant, and of the performance of the consideration by the plaintiff.

As to the first charge asked, see 4 Ala. 232. Even if wrong, the record does not show that the defendant was injured by the refusal of the court to give it. It was not made the predicate for any other charge, and as the case stands upon the record, it is immaterial whether it was a promise to pay the debt of another or not.

RICE, J.—Upon an examination of the letter of Jolley to Walker, we construe the words "I will see you paid," as therein used, to mean *I will pay you.*—Birkmyr v. Darnell, 1 Smith's Leading Cases, 316; Scott v. Myatt, 24 Ala. 489.—The promise contained in that letter, according to our judgment, is not an undertaking to pay the debt of another. We will state some of the reasons which impel us to that conclusion.

That promise and its acceptance by Walker either discharged the debt of Stokes & Purdom, or did not discharge it. We will first consider the transaction upon the hypothesis, that it did not discharge that debt.

Assuming, then, that the debt of Stokes & Purdom to Walker continued to exist after Walker had accepted Jolley's promise, we remark, that the promise is not to pay any debt of Stokes & Purdom, but to pay "*for keeping Stokes & Purdom's horses and drivers for this quarter,*" (that is, the quarter which had commenced some fifteen days before,) at the end of that quarter, "*in Alabama bank-notes.*" The debt of Stokes & Purdom was to be paid in money, the entire amount of which the law would force them to pay in gold and silver coin. The promise of Jolley is not to pay in money, but "in Alabama bank-notes"—which, in law, means only what those notes were worth in coin at the time the payment was to be made (the 30th June, 1842). Upon this promise to pay "in Alabama bank-notes," the law would not force him to pay in coin the entire numerical amount which he promised to pay in the notes, unless it were proved that, at the time the notes were to be paid, they were worth as much as coin. On such a promise (our predecessors said), "to compel the debtor to pay in the precious metals the same amount in dollars, which he promised to pay in bank-notes, would be doing him the greatest injustice, and would be, in effect, to change the contract to his prejudice."—Young v. Scott, 5 Ala. 475; Carter v. Penn, 4 Ala. 140; Wilson v. Jones, 8 Ala. 536.

Suppose that each hundred dollars of "Alabama bank-notes," on the 30th June, 1842, when Jolley was to pay them, were not worth in coin more than seventy dollars; in a suit against Jolley on his promise, on that proof, Walker could recover only seventy dollars for each hundred dollars of Alabama

bank-notes promised him: the payment of the seventy dollars for each hundred promised, would be a full discharge of Jolley from all liability on his promise. But surely this payment of seventy dollars for the hundred, could not be a full satisfaction of the debt of Stokes & Purdom, which never was payable in bank-notes, but was payable in coin to its full numerical amount. And if the promise of Jolley had been a promise to pay *this debt of Stokes & Purdom*, it is manifest, that the payment of seventy cents in the dollar could not have legally discharged him from liability.—Cumber v. Ware, 1 Smith's Leading Cases, 378; Pearson & Fant v. Thomason, 15 Ala. 700.

The promise of Jolley is subsequent to the creation of the debt of Stokes & Purdom, and is upon a consideration new and distinct in its nature, and did not impose the same duty and obligation upon him which existed against them, and was capable of being discharged by a payment which would not have satisfied in full the debt they owed. The conclusion, then, is, that the debt for which Jolley is bound, is a new debt, created by his promise, and is not *the same* debt for which Stokes & Purdom are bound. The promise of Jolley, therefore, in this view of the case, is an *original* undertaking, under the settled rule, that if no other person is liable for *the same* debt for which the undertaking is made, although another person may be liable for a distinct debt which is the measure of the one in question, the undertaking is an original one.—See the note to Leonard v. Vredenburgh, 8 Johns. 23, which is cited and approved in Puckett v. Bates, 4 Ala. 390.

We next inquire, what is the nature of Jolley's promise, if the hypothesis be true, that its acceptance by Walker discharged the debt of Stokes & Purdom. All the cases agree, that if that transaction operated a discharge of their debt, his promise is an *original* one; for, in that aspect of the case, his liability on his promise began at the instant of time when theirs ceased.—1 Smith's Leading Cases, 317, and cases there cited.

Our opinion is, that, under all the facts proved in this case, the promise of Jolley, and its acceptance by Walker, was a new contract, on a new and sufficient consideration, which operated instantly as a discharge of the debt of Stokes &

Purdom to Walker, and bound Jolley to pay for keeping the horses and drivers for the quarter mentioned in his letter, "in Alabama bank-notes," at the end of the quarter.—Wallis v. Long, 16 Ala. 738.

The several matters arising on the several exceptions of the plaintiff in error have been carefully considered, but we find nothing in any of them which raises the question of Walker's acceptance as matter of fact, or which warrants us in reversing the judgment, as the record clearly shows that no injury has been done to the plaintiff in error by any of the rulings of the court below.

The judgment is affirmed.

SHEARER *vs.* LOFTIN ET AL.

1. When a creditor files a bill in equity against his debtor under the act of 1846, giving an attachment in chancery in certain cases, the jurisdiction of the court is not limited to the condemnation of the property seized under the attachment: if its jurisdiction has once rightfully attached, the court may render it effectual to the complainant's relief, by sending out its process, upon a proper application, or widening the sphere of its action, so as to embrace and subject property enough to satisfy his demand.
2. A deed of trust which conveys property absolutely for the benefit of specified creditors, although it purports on its face to be tripartite, does not require to be signed by either the trustee or the beneficiaries to give it effect.
3. But if the trustee is only authorized to sell the property "at the request of the beneficiaries, or a majority of them in interest," and the deed reserves to the grantor the right of redeeming the property by a specified day, beyond the maturity of the greater part of the secured debts, the assent of the beneficiaries cannot be presumed, and nothing short of the express assent of a majority in interest can render the deed available.

APPEAL from the Chancery Court of Sumter.

Heard before the Hon. J. W. LESESNE.

THE original bill in this case was filed in October, 1850, by W. W. Shearer, the appellant, against Albert G. Loftin, Henry R. Thornton, George B. Saunders, Alfred B. Deloach,

Samuel K. Bradford, and Thomas A. Johnson. It alleges, in substance, that said Loftin is indebted to complainant individually, and as surviving partner of the late firm of Lake & Shearer, in several specified sums due by promissory notes and bills of exchange, amounting in all to $2,338 84; that said Loftin has absconded, and continues to reside beyond the limits of this State; that he "has an equity in certain real and personal property in this State," consisting of lands, slaves, and other personal property, which are particularly described in the bill, and are alleged to have been conveyed by said Loftin to said Thornton, as trustee, by deed dated February 8, 1848, to secure to said Bradford a debt of nearly $9,000 falling due in four annual installments; that on May 5, 1849, said Loftin executed another deed of trust, by which he conveyed four other slaves to said Johnson, as trustee, to secure said Deloach and one M. D. Moore; that the trustee, by virtue of the power of sale conferred on him by this last deed, sold three of the slaves thereby conveyed, the proceeds of which were more than sufficient to pay off the secured debts; that the residue of the proceeds of sale, and also the slave unsold, were given up by the trustee to said Saunders, and by the latter to Deloach; that Deloach has also taken possession of the plantation, negroes, and other property conveyed as aforesaid to said Thornton, as trustee, and is applying the profits, &c., to his own use; and complainant insists, that the said slave and sum of money received by Deloach from Saunders are justly subject to his debt, and that Deloach is responsible for the rents and profits of the lands and negroes in his possession. The prayer of the bill is, for an attachment in chancery to be levied upon the property, estate, and effects of the said Loftin; that said property and equitable interests of said Loftin be condemned to satisfy complainant's debt; for an account, &c.

An attachment was issued by a circuit judge, pursuant to the prayer of the bill, and was levied by the sheriff on the land, negroes, and other property described in the bill, in the possession of said Deloach and Saunders.

Deloach answered the bill, admitting that he had the possession of the land and negroes conveyed to said Thornton, and stating that he received them under a contract to pay

rent and hire during the pendency of a detinue suit brought by said Thornton, as trustee, against the sheriff, who had levied executions on them as the property of Loftin; and as to the slave and sum of money received by him from Saunders, as charged in the bill, he alleges that he has a right to them, as the preferred beneficiary in a deed of trust executed by Loftin to secure him and others; that this deed conveys all of Loftin's property, and that it will be insufficient to pay all the debts provided for; that Loftin was insolvent when it was made, and that it is such a general assignment as the court will uphold for the benefit of the secured creditors.

The deed thus set up by Deloach, dated April 17, 1850, purports to be made between said Loftin of the first part, said Saunders (trustee) of the second part, and said Alfred B. Deloach, Reuben Thom, James Duren, Charles B. Gibbs, James Tiller, W. W. Shearer, and Lake & Shearer of the third part. The debts which it provides for are, 1st, a bill of exchange for $510, past due, on which said Deloach is accommodation acceptor; 2d, a promissory note for $500 to one Thomas H. Hawkins, past due, on which said Deloach and Thom are sureties; 3d, a promissory note for $700 to one Lewis May, past due, on which Duren, Thom and Gibbs are sureties; 4th, a promissory note for $503 to the administrator of Joseph Knight, deceased, due the 20th October, 1850, on which Thom and Duren are sureties; 5th, a bill of exchange for $640 to one W. E. Williamson, past due, on which Duren is surety; 6th, a note for $125 to one Moses F. Hoit, due the 1st January, 1851, on which Duren is surety; 7th, a bill of exchange for $2,500 to A. E. & W. J. Ledyard, due the 7th January, 1851, on which Duren is surety; 8th, a debt of $180 due to said Gibbs by open account; 9th, two promissory notes to said Tiller, amounting to $950, both past due; 10th, a bill of exchange for $350 to said Shearer, past due; and, 11th, two promissory notes to Lake & Shearer, amounting to about $1,700, both past due. The property which it conveys may be thus described: First, an undivided moiety in the Planters' Hotel in Livingston, together with all the household and kitchen furniture; 2d, "all his resulting interest in certain lands (715 acres) and negroes (17 in number) heretofore conveyed by deed of trust to James T. Hill";

3d, his resulting interest in certain slaves (7 in number) previously conveyed by deed of trust to Gideon B. Frierson; 4th, his resulting interest in the slaves previously conveyed to said Johnson; and, 5th, his stock of cattle, hogs, &c., the growing crop on his plantation, household and kitchen furniture, &c. The trusts specified in the deed are as follows:

"Upon trust nevertheless, and with the express understanding and agreement, that in case the said Loftin shall fully pay off, satisfy and discharge the said bills of exchange, promissory notes, and open accounts, and in the order in which they are enumerated above, (i. e. the bill of exchange for $510, and the promissory note for $500, are first to be paid; then the note for $700; then the note for $503; then the bill of exchange for $640; then the note for $125; then the bill for $2,500; then the open account for $180; then the notes due Tiller; then the bill of exchange to Shearer; and then the notes to Lake & Shearer,) but in case the said Loftin shall not pay the said bills, notes, and accounts, or either of them, or any part thereof, by the first day of November next, then the said party of the second part shall, at the request of the said parties of the third part, or a majority of them in interest, or their legal representatives, expose to public sale, for cash, before the court-house door in the town of Livingston, on giving twenty days' notice of such sale by posting up an advertisement on said court-house door, all the above-described property, both real and personal, or such portion thereof as shall be sufficient to discharge any liability or liabilities the said parties of the third part may have incurred or paid for the said party of the first part, and also the open account aforesaid, and notes, and bills, including such damages and interest as may have accrued at the time of such sale, and shall apply the proceeds thereof as is above directed. And it is hereby expressly agreed between the parties to this indenture, that the said trustee is to take and retain possession of all the aforesaid property, and to manage and control the same in manner best calculated to protect the interests of the beneficiaries aforesaid; and it is further agreed between the parties to this indenture, that in case of the death, removal, resignation, refusal to act, or other cause whereby the said party of the second part shall become unable or incom-

petent to carry out the provisions of this deed, then the said parties of the third part, or a majority of them in interest, or their legal representatives, shall have power to appoint, by written instrument, some other fit and proper person as trustee, who shall thereby be vested with all the rights, powers, and privileges hereby vested in said party of the second part."

This deed was signed by said Loftin and said Deloach.

An amended bill was subsequently filed, which alleges, that this deed of trust to Saunders "was procured to be made at the sole solicitation and request of said Deloach; that it was executed between midnight and day on the day of its execution, and was executed by said Loftin, Saunders and Deloach alone; that the said deed is fraudulent and void, and was made by said Loftin to hinder and delay complainant and other creditors of said Loftin, and ought not to be suffered to stand in the way of complainant's claims; that at the time complainant's bill in this case was filed, none of the creditors provided for in said deed of trust, except said Deloach and Thom, had assented to the same, but, on the contrary, several of them (especially Duren, Gibbs and complainant) had refused to assent; that whether said deed is valid or not, said Loftin has a valuable interest in the same, and in the profits, trusts, and uses therein, which is subject to complainant's claim."

All the creditors provided for in this deed of trust are made defendants to the amended bill. Gibbs, Thom, Deloach, and Duren filed answers, and a decree *pro confesso* was taken against Tiller. Gibbs does not allege that he assented to the deed, but says that "he never intimated to any one a refusal to receive all the benefit accruing to him under said trust deed, to which he may be legally and equitably entitled."—Thom alleges, that before the filing of the bill "he expressed to said Loftin his assent to all the provisions of said deed, and has ever since relied on it as his only security or indemnity against his liabilities for said Loftin." Duren alleges, "that he heard of the execution of the deed a day or two after it was made, and of Loftin's failure, and has never since looked to any other security for his protection, and has constantly looked to it; that he did not know or suppose, and does not now, that it was necessary he should do more than

acquiesce in the deed; that he spoke of it, and recognized it as security, before complainant's bill was filed, and looked to it solely, and still insists on it for his benefit."

In his final decree the chancellor says, "It is admitted that the property sought to be subjected by the bill is not sufficient to pay the debts having priority to the complainant's; and it is consented by the complainant, that if the court should be of opinion that the deed of trust to Saunders is valid, and should so decree, then the bill should be dismissed; reserving, however, to the complainant the right of appeal to the Supreme Court." The chancellor held the deed valid, and the bill was accordingly dismissed.

The decree of the chancellor is here assigned for error; and there is an agreement of record, signed by the counsel of both parties, that the paragraph above quoted from the opinion shall be considered as forming no part of it or the transcript, and that the reversal shall be at the costs of the appellant, unless the decree is reversed on some other ground.

Turner Reavis, for the appellant:

The appellant insists, 1st, that the deed is invalid for the want of the assent of all the beneficiaries; 2d, that it should have been set aside, because, a majority in interest of the creditors provided for not having assented to it, it could not be executed; 3d, that if valid as to those who assented, it is invalid as to those who did not assent, and as to them should have been set aside, and the trust funds remaining after payment of the claims of those who assented should have been subjected to the appellant's demand; and, 4th, that an account should have been ordered at all events.

1. It seems evident from the deed, that the grantor intended that the assent of the beneficiaries should be manifested by their signing it. This is shown by these circumstances: 1st, it purports to be tripartite; 2d, it was signed by Deloach at the time it was made; 3d, it could not be executed at all, until a majority in interest (not a numerical majority) should assent to it. If such be the proper construction of the deed, it could not become valid against an attaching creditor, until the beneficiaries actually signed it.—5 Cond. Eng. Ch. R. 1;

3 Sim. 1; 17 Ala. 662, citing and approving 3 Sim. 1; 10 Ala. 235; 2 My. & K. 492; 8 Cond. Eng. Ch. 97.

If, however, the deed does not impliedly require that all the parties should signify their assent by signing it, then their assent must be signified to the trustee.—10 Ala. 231, and other authorities cited *supra*. There is nothing in the answers to show that any such assent was given by Tiller, Shearer, Duren, or Gibbs. Assent is necessary to give validity to the deed, 1st, because all the debts except two were past due at the time it was made, and yet delay is stipulated for from that time until the first day of November following; 2dly, because it stipulates for the right of redemption within that time; 3dly, because the creditors are placed upon unequal footings, by the provision that the debts shall be paid in the specified order of priority; 4thly, because the deed could not be executed at all without the assent of a majority in interest, and because it provides for the appointment of another trustee, in a certain event, by a majority in interest; and, 5thly, because debts which would not be due at the time fixed for closing the deed, are required to be paid before debts which had been long past due,—thus delaying some of the creditors in the collection of their debts, reserving to the debtor time and a right to redeem, and requiring certain acts to be done by the beneficiaries. These provisions bring the deed completely within the decisions of this court which require the assent of all the beneficiaries.—7 Ala. 262; *ib.* 138; 10 *ib.* 271; *ib.* 231; 8 *ib.* 9; 14 *ib.* 702; 15 *ib.* 502; 16 *ib.* 294; 11 *ib.* 9; 17 *ib.* 662; 21 *ib.* 333; *ib.* 380; also, 2 Story's Eq. §§ 1036 a, 1036 b, 1045, 1196; 4 Russell 1; 7 Dana 495.

The deed was made for the fraudulent purpose, on the part of Loftin, of avoiding the payment of the debt to Boykin, McRae & Foster. This is shown by his expressed determination, on the day the deed was made, to avoid the payment of that debt: by his making the deed secretly, at midnight of that day; by his dictating the terms of the deed, from which that debt is omitted, although Saunders says it was spoken of by him; and by the fact that an attachment on that debt was in the hands of the sheriff, which accounts for the haste, secrecy, and unusual hour of making the deed. The purpose

of Loftin, being fraudulent, renders express assent necessary, even if assent would be implied in the absence of such purpose.—18 Ala. 301; 23 *ib.* 801.

This deed is a mere deed of trust, and not a general assignment; for the proof shows, that Loftin owed a large amount of debts for which he made no provision, and had rights, money, bills, and notes which he did not convey; he did not, therefore, convey all his property, nor include all his debts, both of which are necessary to constitute a general assignment to which the assent of creditors will be presumed. But if it be an assignment, as the deed contains provisions which are not beneficial to all the creditors, the assent of all cannot be presumed.—Cases cited above. If it is a general assignment, it is fraudulent and void, because it does not fix the rights of the creditors, nor devote the property, absolutely and unconditionally, to the payment of the debts; and because, also, it stipulates for benefits to the grantor. It stipulates, in effect, for time; it does not include all the grantor's debts; it restrains the trustee from selling more than enough of the property to pay the particular debts, whereby a resulting trust to the grantor is created; it provides for the right of the grantor to redeem the property by a specified time; and it gives a majority in interest the right to require a sale or not, and to fix the time of sale. The rights of the minority, therefore, are not fixed by the deed, but are left to the arbitrary discretion of the majority; and no matter what the object of this provision was, its effect is the same.—12 Ala. 104; 4 *ib.* 382; 1 Sm. & Mar. Ch. 207; 6 Hill's (N. Y.) R. 438; 4 Barb. S. C. R. 546; 1 Sandf. Ch. R. 43; 2 Comst. 365; Burrill on Assignments, pp. 209, 212.

2. The appellant and Duren constituted a majority in interest, their debts amounting to a great deal more than half of the whole amount provided for. They having dissented from the deed, it cannot be executed; and because it cannot be executed, it is invalid, even if the assent of a majority in interest would have rendered it valid. Nor can it be executed under the direction of a numerical majority; for, if Deloach, Thom, and Gibbs assented, Shearer, Duren and Tiller did not, and consequently there is no majority. The deed, therefore, should have been set aside on this ground.

3 and 4. The third and fourth points seem self-evident.

ROBT. H. SMITH, *contra*:

In Elmes v. Sutherland, 7 Ala. R. 243, the question was, whether the assent of creditors would be presumed to a deed of trust for them which postponed the payment of debts past due to a period designated in the deed, the grantor not being insolvent; and the court held not, but that the assent of all the creditors was necessary under its provisions; citing Story's Eq. § 972; 10 Pick. 408; 3 Mete. 139; 3 B. & A. 31; 3 Sim. 1; 17 Mass. 454. See, also, Lockhart v. Wyatt, 10 Ala. 231; Hodge v. Wyatt & Houston, *ib.* 271.

Smith v. Leavitts, 10 Ala. 103, was an assignment (and a suspicious one, too) by an insolvent, providing first for preferred creditors, and secondly for such as should come in, release, &c.; and giving power to the trustees, at their election, to sell for cash or on credit: *Held*, that the assent of preferred creditors would be presumed, and if any preferred creditor should refuse to assent, that the deed would be good for the others. In that case, the power to sell on credit was a postponement of the payment of the debts out of the trust funds, but not a postponement of the day of payment of the debts: the creditor could in the meantime sue on his debt, just as if the deed had not been made. See this illustrated in 14 Ala. 702. In Elmes v. Sutherland, *supra*, an extension of the debt is provided for—a new day of payment.

Kinnard v. Thompson, 12 Ala. 489, was very similar, in some respects, to the deed now under consideration. The deed was to secure (first) Rhodes, who was a surety, and (secondly) creditors whose debts were past due; it could only be closed after a crop had been made; it could only be closed on request of a majority of the creditors; and one of the secured creditors dissented, and levied. In all these respects, the case is the same as the one at bar; and further, it did not appear that any but the preferred creditor accepted, nor (except inferentially from the deed) that the grantor was insolvent. The point was made in argument, that the assent of the creditors would not be presumed, and that the deed was a mere power; but the court repudiated the English and Massachusetts cases as to the assent of creditors, and held

that their assent would be implied, and the deed be good for all who did not dissent. The case at bar, in several particulars, is stronger: here the deed conveys the possession to the trustee absolutely; while there the grantor retained it to make a crop for his own benefit, subject to be divested only if the trustee (or the preferred creditor) should think it to the interest of beneficiaries as against the other creditors, he held the possession without their power to prevent it.

The law, then, may be thus stated: If the debtor make a trust deed, and attach new conditions to his debts which are onerous to all the creditors, or requires all of them, in order to take under the deed, to do anything that impairs their debts, their assent will not be presumed, and the deed is a mere power; and if such is the effect as to a part only, the assent of that part will not be presumed, but that of the others will. But a deed which leaves the creditor free to resort to all his legal remedies for his debt, and provides additional security, no matter how that security is clogged with other conditions not illegal or fraudulent, is for his benefit, and his assent will be presumed.

If the case in hand is rested on the broad ground (sometimes assumed by the *dictum* in 16 Ala. 301, but shown to be indefensible by Mauldin v. Armistead and Kinnard v. Thompson) "that the deed is revocable until the creditors assent, if it provides that they shall do or omit anything whatever," in order to take under it; yet this deed requires nothing whatever to be done, to enable the creditors to take. The sale is to be made on instructions from a majority; and this, at most, is something to be done to perfect the sale, but not to take under the deed. Besides, this is for the benefit of the creditors, by making them, *pro tanto*, their own trustees, and so far protecting them against the wrong or mistake of the trustee. Suppose it had made the creditors trustees, and had given them the power to sell (after a named day) at the discretion of a majority; this certainly would be a favor to them, and the provision in the deed is precisely the same.

But suppose the debts due by Loftin when the deed was made fall under Elmes v. Sutherland and kindred cases; then it only follows, that the assent of such will not be presumed, but that of the preferred creditors (who had no debts, and

were mere sureties) will be presumed.—Kinnard v. Thompson, and Mauldin v. Armistead, *supra*. The object of the postponement evidently is, to mature the crop, of which the trustee had the possession for the creditors.

Again, Loftin was insolvent, and the assignment was a general one; and all the cases show that assent will be presumed in such case.—See cases collected in Reavis' Dig., p. 60 (d.) The deed not only shows that the sale was to take place at the earliest moment the crop could be gathered, but it was evident that there was a probability that longer than November would be required to gather it; and hence the right to the creditors, or a majority of them, not to have a sale so soon. It shows, also, that other trusts were to be closed before this could be, and without the stipulation for November it could not have been closed even then. There is nothing in the position, that the postponement deprived the creditors of the right to pursue the fund for that time: even if a right were reserved to Loftin for that time, any creditor might subject his interest by bill.—Hopkins v. Scott, 20 Ala. 179, and other cases. But the profits for that time are devoted to the creditors: the crop to be made is conveyed by the deed.—Abercrombie v. Bradford, 16 Ala. 560.

As to fraud in fact: There is no allegation that the beneficiaries participated in any fraud.—7 Ala. R. 142, and cases cited on p. 151; 9 *ib.* 904. The allegation of fraud should specify that Boykin, McRae & Foster were creditors, and were intended to be defrauded; otherwise, the defendant could not know what he was called on to meet. There must be a statement of the facts in which the fraud consists: a general charge of them is not sufficient.—2 Ala. 604; 7 Por. 549. Very little weight is to be attached to Loftin's remarks, under the irritating circumstances under which they were made; and the assertion that he had money is fully disproved. The bill, in fact, negatives the idea of the deed having been made by Loftin to defraud any one: it avers that it was made "at the instance" of Deloach, and of course not on his own suggestion or spontaneous desire. There is no pretence that Saunders, or any of the beneficiaries, knew of any intention to defraud, or even of the existence of Boykin, McRae & Foster's debt.

The bill admits that Deloach and Thom accepted, and only

alleges that Gibbs and Duren did not; while they both say they did accept, and there is only one witness against Duren, and none against Gibbs. The deed, then, is good as to all, even Tiller, who is not shown by the bill not to have assented.

The bill rests entirely on the act of February 5, 1846, giving an attachment in chancery, and independent of that act the court would have no jurisdiction. The prayer of the bill, and the attachment, only relate to the property in the Thornton and Johnson deeds, and the levy is on nothing else. The answers having set up the Saunders deed, the amended bill is filed, not to reach other property, but to get rid of that deed, as to the property already proceeded against: it prays no further attachment, and none was granted, issued, or levied. The complainant, then, is in court only in reference to the property in the two first-named deeds, and cannot enter into a contestation as to any other: he cannot get before the court the title to any other property. This accounts for the fact, that evidence was not taken to show that all the other property in the Saunders deed was subject to judgment and execution liens, which swept it away, and placed it beyond the reach of either Saunders or complainant; and for the further fact, that it is not in any manner noticed in the progress of the suit, not even with reference to its value: for all the purposes of this suit, it was of no value or moment. The proceedings are in derogation of the common law, are invasive of the right of trial by jury, and must be strictly pursued.

CHILTON, C. J.—According to the record, as amended by the agreement of the counsel, if we concede that all the deeds made by Loftin are valid, the complainant is entitled to an account, so as to ascertain the residuum which may remain after satisfying the liens created by those deeds, and for which he should have a decree. We do not think the jurisdiction of the court is limited to the condemnation of the property seized under the writ of attachment; but if its jurisdiction has once rightfully attached, the court may render it effectual to the party's relief, by sending out its process, upon a proper application, or widening the sphere of its action, so as to embrace and subject property enough to satisfy the complainant's demand.

2. We do not concur with the counsel for the appellant, that the deed of 17th April, 1850, from Loftin to Saunders, trustee, should have been signed by all the beneficiaries, to render it valid. Although it purports to be tripartite, and is signed by Deloach, one of the beneficiaries, there is nothing upon the face of it which shows that it was to be inoperative until signed by the other beneficiaries. It cannot be distinguished from many other cases, which have been passed upon by this court, holding that neither the trustee, nor the beneficiaries, are required to sign the deed to give it effect.

3. It is needless, under the view we take of this case, to decide whether it requires the assent of all the beneficiaries to the provisions of this deed, to vest the title in the trustee, and cut off the grantor's right of revocation, for we feel satisfied, that under its peculiar provisions, nothing short of the express assent of a *majority in interest* of the parties provided for, could render the deed available. The trustee has no power to execute the trust by a sale of the property, until directed by such a majority, or by all the beneficiaries.

4. We cannot presume the assent of the beneficiaries to this deed. It postpones debts for which all the beneficiaries are liable, for several months after they fall due. True, it provides for the payment of two demands, for which one of the beneficiaries (Duren) is liable, before they fall due; yet he is postponed for a large sum, and we cannot presume that it was beneficial to him to be deprived of resorting to this property in satisfaction of demands due when the deed was made, for the provision, more or less contingent, made for the security of those not due. Although the grantor may have embraced all his property in this deed, it is nevertheless, as appears on its face, a deed of trust, reserving to himself the right of redeeming the property by a given time, which right will continue until the trust shall have been executed. That the deed does not postpone the creditor's right to sue on his demand, is not material under the circumstances here presented; for, practically, there can be but little difference between denying the right to sue, and depriving him of all means of satisfying his judgment in the event his suit should result in one in his favor. Aside, however, from the postponement of the creditors, and reserving the right of redemp-

tion, we could not assume that the provisions in this deed would prove beneficial to any of the parties, taking into consideration that all the property of the grantor is conveyed, with the right of a majority in interest of the beneficiaries to say when it shall be sold. We cannot assume that the property in the deed will pay all the demands mentioned in it, and this litigation is very persuasive to the contrary. Suppose it falls short; the preferred creditors may say, we will not accept, because, having no power to order a sale, we may be postponed by a *majority in interest* to an indefinite period; for the interest of those whose claims would be left unsatisfied by a present sale, would prompt them to wait until the appreciation of the property from its natural increase, or rise in value in the market, or the rents and profits of it under the control of the trustee, would make it pay their demands—and thus, for the benefit of a majority in interest, they are made to incur the risk of its depreciation, and compelled to submit to this delay. The majority may say, if we assent, others are preferred before us, and the effects may be exhausted before our claims can be reached; whereas, by dissenting, the deed cannot be valid, because it provides that a majority in interest shall concur in ordering a sale—thus all the creditors shall be placed upon an equality. Thus it is that no legal presumption of assent can be indulged, because the court cannot see that the provision would be beneficial to a majority.

We would here take occasion to remark, that deeds containing provisions of this character, embracing all the grantor's property, and providing for the right of redeeming on the part of the grantor, may readily be made instruments of fraud on the part of the grantor in delaying and hindering the collection of his debts, by presenting alternatives requiring their acceptance, and making the interest of each so operate upon that of the other as to work very great delay. Had the deed, in this instance, provided that those who should assent to it should take, and should have power to direct the execution of the trust, although a majority in interest should decline accepting, it would have been to the interest of all parties to have accepted, because of this adroit provision that a majority in interest could control the sale. The preferred

minority would accept, because, on their failure, the majority would take and exhaust the property; and the minority having accepted, the majority must accept, because, if not sufficient to satisfy all the demands, or to reach theirs after satisfying the minority, they can have the property held up and thus avail themselves of the chances of its appreciation as above shown. Thus the grantor obtains all the indulgence he desires, all the while having the right to redeem, and exempting his property thus tied up from liability to his other creditors. Whether such a conveyance can be supported may well be questioned, and we leave it an open question, since the facts of the case before us do not involve it.

Coming next to the facts of the case, we are satisfied they do not show that a majority in interest of the persons provided for assented. Duren and the complainant constitute such a majority, and it is very clear that neither of them had assented before the bill was filed. Duren says, in his answer, that he looked to the deed for indemnity, &c.,—spoke of it publicly, &c.; but he no where says that he notified the trustee of his acceptance. Indeed, the evidence of Maury clearly shows that he was making preparation to assail the deed by filing a bill after the complainant's bill was filed, and that before that time he had requested said Maury to consult an attorney in his behalf, who did so, and reported the result. We think it clear, from the whole record, that he did not accept by notifying the trustee before Shearer's bill was filed; and this being an affirmative fact, he should have shown it, if it existed. Indeed, his answer assumes that he did not deem such notice essential. But, without it, the trustee does not become his bailee—he is vested with a power subject to revocation, and which is revoked by the attaching creditor who acquires a lien.—See the cases on the brief, especially Lockhart v. Wyatt, 10 Ala. 235.

The deed then of the 17th of April, 1850, of Loftin to Saunders, must be regarded as interposing no obstacle to subjecting the property to the satisfaction of the complainant's demand.

Let the decree be reversed, and the cause remanded, to be proceeded in as above indicated.

MOBLEY *vs.* BARNES ET AL.

1. In trover for the conversion of a slave, the declaration of defendant's vendor, "that he had promised to give the slave to the plaintiffs," is not admissible evidence against defendant, being neither explanatory of possession, nor in disparagement of title.

APPEAL from the Circuit Court of Chambers.
Tried before the Hon. ROBERT DOUGHERTY.

TROVER by Aramanus L. Barnes and Eldridge M. Barnes against Warren L. Mobley, for the conversion of a slave named Baze; plea, the general issue, with leave to give any special matter in evidence. For the former report of the case, see 21 Ala. 232-9.

The bill of exceptions in the present record states, that the plaintiffs, on the trial, "adduced evidence tending to show that the negro in controversy was the property of their grandfather, Jethro Mobley, at and before John Barnes, their father, married a daughter of said Jethro, which marriage occurred in Georgia in the year —; that soon after said marriage, said Jethro gave said negro to said John Barnes, and that she remained in his possession until, at, and after the death of his said wife; that soon after the death of Mrs. Barnes, who was plaintiffs' mother, said Jethro Mobley went to the house of said John Barnes, and told him, 'that he was a wild young man, that it would be better for him to let him (said Jethro) have the plaintiffs, said negro, and the bed and bed-clothes, and that if he would do so, he (said Jethro) would take care of plaintiffs, and would take care of said negro for the benefit of plaintiffs, and at his death would make plaintiffs equal to his own children'; (and the evidence was conflicting as to whether said John Barnes gave the said negro to said Jethro or to his children;) that said John Barnes assented thereto, and said Jethro thereupon took said negro and plaintiffs, *and hired them out annually* for several years for the declared benefit of plaintiffs. At this stage of the evidence, the plaintiffs offered to prove by a female witness, that Jethro Mobley told

her, that he had promised to raise plaintiffs, and to educate them, and to give them the negro alluded to, as she thinks. To this evidence the defendant objected, on the ground, that it was illegal and irrelevant, and was the mere declaration of a third person, and not admissible evidence against the defendant; but the court overruled the objection, and admitted the evidence, and the defendant excepted." The defendant then offered in evidence a bill of sale of the negro, from Jethro Mobley to himself, dated January 1, 1835.

The admission of the evidence of the female witness, as to the declarations of Jethro Mobley, is the only error assigned.

JAMES E. BELSER, for the appellant, contended that the declarations were not admissible against the defendant, because, 1st, Jethro Mobley himself was a competent witness, and therefore another person could not depose to his declarations (1 Stew. & Port. 220; 4 Port. 253; 9 Metc. 471); 2d, because they were merely narrative of a past fact, and not admissible as part of the *res gestæ* (20 Ala. 123; 17 *ib.* 366; 8 *ib.* 650); and, 3d, because they were not shown to have been made anterior to the defendant's bill of sale (2 Phil. Ev. C. & H.'s Notes, pp. 655-6).

WM. H. BARNES, *contra*, insisted, 1st, that as Jethro Mobley was shown to have once had possession, the presumption is, that his possession continued until he is proved to have parted with it (1 Greenl. Ev. § 42), and therefore his declarations, made while in possession, were admissible evidence as explanatory of his possession (Barnes v. Mobley, 21 Ala. 239; 4 *ib.* 40; 17 *ib.* 222; 18 *ib.* 201, 343, 822); 2d, that they were admissible evidence as against defendant, because in disparagement of his vendor's title (21 Ala. 139; Nelson v. Iverson, 17 *ib.* 232; 1 Greenl. Ev. § 190).

GOLDTHWAITE, J.—The declarations of persons not parties to the suit are, in general, mere hearsay, and for that reason are inadmissible, unless made under circumstances, or offered in connection with testimony, which would render them competent. In the present case, the bill of exceptions shows, that the person by whom the declaration was made

was in possession of the slave to which it related, at two different periods, but it does not show, either directly or inferentially, that the declaration was made at either of those periods, and it could not for that reason be regarded as part of the *res gestæ*. But, if he had been in possession, it would have made no difference, as the declaration was not explanatory of the act of possession, but narrative of a past occurrence.—1 Greenl. Ev. § 110.

But it is said, that the declaration was made by the party under whom the appellant claimed,—was in disparagement of his own title, and therefore binding on his vendee. An admission by one, that he had promised to give certain property to another, cannot, in any aspect in which it can be considered, be deemed a repudiation of his own title by the party making the admission. On the contrary, it rather implies that he regarded the ownership as in himself when he made the promise, and is very different from the declarations which were held to be competent evidence on that ground when the case was last here.—Barnes v. Mobley, 21 Ala. 232, 239. There they were made by the vendor in possession, before the sale, and were admissions directly recognizing the title of the appellants, and for that reason were good against the vendee.

Our conclusion is, that upon the facts as stated in the record, the court erred in receiving the evidence objected to. Its judgment is, therefore, reversed, and the cause remanded.

RICE, J., having been of counsel, did not sit in this case.

HALL ET AL. *vs.* HOLCOMBE.

1. In an action (under the Code) for the recovery of land, a plea in abatement, setting up the pendency of a former suit brought by plaintiffs *and others* to recover the same land, is fatally defective on demurrer.

APPEAL from the Circuit Court of Shelby.

The record does not show the name of the presiding judge.

THIS action was brought by the appellants, on the 19th January, 1853, to recover a certain tract of land, which is particularly described in the complaint, together with damages for its detention. The defendant pleaded in abatement the pendency of a previous action of trespass, brought by plaintiffs and others against him, for the recovery of the same land. To this plea the plaintiffs demurred, but the court overruled the demurrer, and, on their declining to plead over, rendered judgment quashing the complaint; and the judgment on the demurrer is now assigned for error.

MORGAN & MARTIN, for the appellants.

WHITE & PARSONS, *contra*.

CHILTON, C. J.—The plea in abatement in this case is clearly bad, and should have been so held upon demurrer.—Athough the former action was brought to recover the same land, it shows that it was brought by other persons than those who are the present plaintiffs. True, the present plaintiffs unite with them; but this makes no difference: the legal presumption is, that it was properly brought, and hence that it is not brought upon the same title; as the rule is, that all the plaintiffs must recover, or none of them can.—1 Chitty's Pl. 66; Adams on Ej. 299, and notes; Patton v. Crow, at the present term. Assuming, therefore, that the former action is well brought, it is upon a joint right of all the plaintiffs to that suit,—a title different from that to be tried in this suit.

Aside, however, from this objection, the case falls within the decision of this court in Hall and Wife v. Wallace, 25 Ala. Rep. 438.

Judgment reversed, and cause remanded.

CARVER *vs.* HALLETT, EXECUTOR, &c.

1. An order of the probate court, made on the application of two co-executors, for the allowance to each of a specified sum as annual compensation for his services in the management of the estate, will not support an action at law in favor of one of them, or his assignee, against the other.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

THE complaint in this case was as follows:

"Thomas J. Carver, assignee of Robert L. Walker, *vs.* William R. Hallett, executor of Joshua Kennedy. } The plaintiff claims of the defendant, as executor of Joshua Kennedy, deceased, the sum of two thousand, seven hundred and fifty-five dollars, amount of compensation for his services as executor of the estate of said Joshua Kennedy, as allowed by the decree of the Orphans' Court of Mobile county, rendered on the 3d day of December, 1845, with interest on said sum; which claim has been assigned to plaintiff."

In support of his complaint, at the trial, the plaintiff offered in evidence an order of the Orphans' Court of Mobile county, in these words:

"In the estate of Joshua Kennedy, deceased. } Orphans' Court of Mobile Co. December 3, 1845.

"On the application of the executors that an annual compensation be allowed them for services in the management of said estate, it is ordered, that a compensation of three thousand dollars *per annum* be allowed to Wm. R. Hallett, one of the executors, in lieu of commissions, for his attention and services in the management of said estate, to commence from the date of his letters testamentary; and it is further ordered, that a compensation of three hundred dollars *per annum* be allowed to Robert L. Walker, the other executor, in lieu of commissions, for his attention and services in the management of said estate, to commence from the date of his letters testamentary."

The plaintiff also proved the assignment of this claim by said Walker to himself before the institution of this suit.—On an agreed statement of facts, which it is unnecessary to notice further, the court gave judgment for the defendant, and its judgment is now assigned for error.

JOHN A. CUTHBERT and P. HAMILTON, for the appellant.

E. S. DARGAN, *contra*.

GOLDTHWAITE, J.—If the order of allowance had been put in the shape of a judgment, against the estate, or against the co-executor, we should then have had great doubt whether it would serve as a foundation for a suit at law, which must rest upon a legal demand. We incline to the opinion, that an order of such a character is so connected with the administration, that it could be enforced only through the medium of the court which controlled the estate; but it is unnecessary, in the present case, to go so far, as the order of the Probate Court, on which it was based, was simply one which ascertained the amount to be allowed to the executor as compensation for his services. There was no judgment against the co-executor—no direction even that he should pay it; and it therefore creates no legal liability as against him. As a judgment, it was void.—Hughes v. Mitchell, 19 Ala. 268. If Walker had not the funds in his hands to pay it, the Probate Court, by virtue of its general powers over the estate, might have directed it to be paid by the other executor, and enforced the payment by attachment; but the order, in the shape in which it is, creates no demand which can be enforced in a court of law against him.

As the order would not have authorized the party in whose favor it was made to recover upon it, his assignee stands in no better situation; and in rendering judgment for the defendant, in a suit where the evidence showed that the plaintiff had not the right to recover upon any state of the pleadings, there was no error.

Judgment affirmed.

MILLER AND WIFE *vs.* FLOURNOY'S HEIRS.

1. Although the last clause in a will must prevail over a preceding clause which cannot be reconciled with it, and the particular intent must yield to the general, when the two are equally apparent, and so repugnant that both cannot stand; yet the great and cardinal rule of construction is, to give effect, if possible, to every part of the will.
2. By the fourth clause of his will, testator directed his wife to keep together, under her care and protection all his children, and "for the better enabling her to do so," gave her during her widowhood, or until his youngest child attained its majority, "the control and use of any five negroes not otherwise disposed of, to be by her selected"; by the fifth clause, he bequeathed four slaves to his wife during her natural life or widowhood, and on her death or marriage to his children George, William, Marcus, Augustus and Eliza; and the ninth clause was in these words: "I will and bequeath unto my said wife, and my children George, William, Marcus, Augustus and Eliza, and to their heirs forever, all the rest and residue of my personal estate, to be equally divided among them, share and share alike, in the manner hereinafter mentioned and described; and that each of my said children shall, upon arriving at full age in law, be entitled to demand from my executors their just distributive share of said estate in this clause mentioned, to be ascertained and determined upon a fair valuation of all my property herein referred to, at the time of his or her majority, by any three disinterested slaveholders of the county; always counting my said wife as a child, *it being my intention to make her and all my children equally interested in the disposition of my estate, including the five negroes hereinbefore mentioned in the third (fourth?) clause*, as reserved for the use of my wife and family": *Held*, that the slaves mentioned in the fifth clause were not included in the general residuary clause, but, on the marriage of the widow, passed to the children to whom they were specifically bequeathed.

APPEAL from the Court of Probate of Chambers.

IN the matter of the appellants' petition for the distributive share of Mrs. Miller (formerly Mrs. Flournoy) in the estate of her former deceased husband, Marcus A. Flournoy, whose will contained the following clauses, in addition to others which have no bearing on the case:

"Fourthly.—It is my will and desire also, that my wife, Eliza A. Flournoy, shall keep together, and with her and under her care and protection, all my children; and for the better enabling her to do so, it is my will and desire, that she shall have the control and use, free from any charge or expense,

of any five negroes, to-wit, three women, one man and one girl, to be by her selected from all my negroes not herein otherwise disposed of, at the time of my death, until my youngest child living at the time of my decease shall arrive at the age of twenty-one years; *provided*, however, that my said wife is only to have power and control of said five negroes during her widowhood.

"Fifthly.—It is also my will and desire, and (I) so direct, that old Shadrach, old Lucy, Duke, Nancy (wife of Duke), and the present and future issue and increase of said females, shall be and remain with my said wife, during her natural life or widowhood; and at the death or marriage of my said wife, I give and bequeath said negroes in this clause mentioned to my children, George Flournoy, William Flournoy, Marcus Flournoy, Augustus Flournoy, and Eliza Flournoy, and such other children as I may hereafter have."

Sixth.—Specific legacy of slaves to Thomas F. Flournoy.

Seventh.—Specific legacy of slaves to Robert W. Flournoy.

Eighth.—Specific legacy of slaves to Mary Ann Caldwell (formerly Flournoy) and the heirs of her body.

Ninthly.—I will and bequeath to my wife, Eliza A. Flournoy, and my children, George M. F. Flournoy, William M. Flournoy, Marcus A. Flournoy, Augustus S. Flournoy and Eliza A. Flournoy, and to their heirs forever, all the rest and residue of my personal estate, to be equally divided among them, share and share alike, in the manner hereinafter mentioned and described; and that each of my said children shall, upon arriving at full age in law, be entitled to demand from my executrix and executors, hereinafter named, their just distributive share of said estate in this clause mentioned, to be ascertained and determined upon a fair valuation of all my property herein referred to, at the time of his or her majority, by any three disinterested slave-holders of the county of Chambers; always counting my said wife Eliza as a child, it being my intention to make her and all my children equally interested in the distribution of my estate, including the five negroes hereinbefore mentioned in the *third (?)* clause as reserved for the use of my wife and family."

The court below decreed, that Mrs. Miller was not entitled, under the general residuary clause, to share in the negroes

specifically bequeathed by the fifth clause; to which ruling of the court the appellants excepted, and they now assign it for error.

RICHARDS & FALKNER, for the appellants:

The words of a will are to be construed literally, so as to carry into effect the intention of the testator.—Bell and Wife v. Hogan, 1 Stew. 536. If all the provisions of the will are irreconcilable with each other, the last clause must prevail. Moore v. Dudley and Wife, 2 Stew. 170; Hunter v. Green, 22 Ala. 329. When a general and a particular intent are equally apparent on the will, and so repugnant to each other that both cannot stand, the particular must yield to the general intent.—Stallsworth v. Stallsworth, 5 Ala. 143.

The application of these principles to the case at bar, shows that the court below erred in its decree. The testator here declares his intention, by the ninth clause, to make his wife and all his children equally interested in his estate; while other portions give specific legacies to certain children. The entire will can stand, and all its clauses be reconciled, by appraising all the property, including the specific and residuary legacies, and thus ascertaining the whole value of the estate, and then equalizing the legacies out of the residuary clause. But, if the several clauses are so repugnant that they cannot be thus reconciled, then, it is insisted, the general intent apparent on the face of the will, and clearly expressed in the ninth clause, viz., to make the widow and children equal in the distribution of the estate, must prevail over the particular intent indicated in the specific legacies.

No counsel appeared for the appellees.

CHILTON, C. J.—We fully concur with the counsel for the appellants, that the last clause in a will is to prevail over a preceding clause which cannot be reconciled with it; and also in the proposition, that where there is a general and a particular intent, equally apparent upon the will, and so repugnant that both cannot stand, the particular must yield to the general. But the great and cardinal rule which should govern in the construction of wills, as well as other instru-

ments, is, to give effect, if possible, to every part of it.—Stallsworth v. Stallsworth's Ex., 5 Ala. Rep. 148.

When we consider all the provisions of this will together, we entertain no doubt as to the true intent and meaning of the testator. The ground of the complaint by the appellants is, that they have been excluded from a share of the slaves embraced in the fifth item of the will, which declares, that these slaves, with their future increase, &c., shall be and remain with the testator's wife, to use his own language, "during her natural life or widowhood; and at her death, or marriage, I give and bequeath said negroes, in this clause mentioned, to my children, George, William, Marcus, Augustus, and Eliza A. Flournoy, and such other children as I may hereafter have."

The widow has since married, and by the terms of the bequest, the slaves go to the children named. Is there any thing in the ninth or residuary clause of the will, which requires this bequest to give way, and which thwarts this clearly expressed desire. That clause is as follows: "Ninthly—I will and bequeath unto my wife, Eliza A. Flournoy, and to my children George, William, Marcus, Augustus, and Eliza A. Flournoy, and to their heirs forever, all the rest and residue of my personal estate, to be equally divided among them, share and share alike, in the manner hereinafter mentioned and described; and that each of my said children shall, upon arriving at full age in law, be entitled to demand, of and from my executrix and executors, hereinafter named, their just distributive share of said estate, in this clause mentioned; to be ascertained and determined upon a fair valuation of all my property herein referred to, at the time of his or her majority, by any three disinterested slaveholders of the county of Chambers; always counting my said wife Eliza as a child, it being my intention to make her and all my children equally interested in the disposition of my estate, including the five negroes heretofore mentioned in the third (*fourth*?) clause as reserved for the use of my wife and family."

In this clause, the testator evidently alludes to the residuum of his personal estate, including the five slaves which the wife is authorized by the fourth clause of the will to select and retain during widowhood, to enable her to provide for

keeping the family together. This estate is to be *equally* divided among them, share and share alike, in the manner thereinafter mentioned and described—to-wit, "to be ascertained and determined, upon a fair valuation of all my property herein referred to" (that is, as we understand it, referred to in this ninth clause) by three disinterested slaveholders, counting his wife as a child, it being his intention to make her and all his children equally interested in the disposition of his estate, (that is, of the estate here alluded to, and about the division of which he was then providing,) including the five negroes mentioned in the fourth clause as reserved for the use of the wife and family. Confining this equality of distribution to the residuum of the personal estate, the whole difficulty vanishes. If by the "disposition of his estate," the testator meant his entire property, why does he add "including the five negroes"? The inclusion of these, shows that the other bequests were excluded, upon the maxim, "'*inclusio unius exclusio alterius*," and plainly limits the meaning of the testator to his residuary personal estate of which he was disposing by the ninth clause. The construction contended for by the appellants would defeat the will, and leave the parties pretty much in the same condition as if none had been made. It would render nugatory the conditional legacies given to the wife, which were made dependent upon her remaining a widow. We think the Probate Court decided correctly.

Judgment affirmed.

TAYLOR *vs.* MORRISON.

1. A surety, who receives from his principal a mortgage, or other security, is regarded as a trustee for his co-surety, and held to the exercise of the duties which attach to that relation; and if he afterwards, without the consent of his co-surety, surrenders or abandons the security, merely because the mortgagor objects to giving up the property, he cannot obtain contribution from his co-surety.
2. An abstract charge, which asserts a correct legal proposition, is no ground for reversal, when the record shows that it could not have misled the jury.

APPEAL from the Circuit Court of Cherokee.
Tried before the Hon. ANDREW B. MOORE.

MATTHEW J. TURNLEY, for the appellant.
WHITE & PARSONS, *contra*.

GOLDTHWAITE, J.—This was a suit by a surety against his co-surety for contribution. The record shows, that the plaintiff received from the principal debtor full indemnity by mortgage. This mortgage he released, and received therefor a promissory note. The mortgage enuring to the benefit of all the sureties, the one who received it must be regarded as a trustee for the other, and is bound to the exercise of the duties which attach to that relation.—Theobald on Prin. & Sur. 95, 98; Baker v. Briggs, 8 Pick. 129; Haynes v. Wood, 4 John. Ch. 129. The security which the plaintiff received he had no right to abandon, or part with, without the consent of the other party who was interested in it, for no other reason, than that the mortgagor, or his personal representative, objected to giving up the property. The right of contribution results from natural equity (White v. Banks, 21 Ala. 705; Tyus v. DeJarnette, at the present term); and whenever the equity, upon which the right is based, is rebutted, it cannot be enforced. In the case made by the record, the surety who is claiming contribution is shown to have received full indemnity, which he has parted with without cause; and having done this, it would be against all equity to allow him to call upon the co-surety to bear the consequences of his neglect.

But, it is said, there was no evidence of fraud, and therefore the charge of the court, to the effect that the plaintiff was estopped from setting up the fraud to avoid the effect of the deed, was abstract. We see no evidence on the record that the deed was fraudulent; but an abstract charge, when it asserts a correct legal proposition, is no ground for reversal, unless it tended to mislead the jury (Hughes v. Parker, 1 Port. 139; Towns v. Riddle, 2 Ala. 694), which it could not do in this case.

Judgment affirmed.

RICE, J., having been of counsel, did not sit in this case.

MINELL & Co. *vs.* REED ET AL.

1. The holder of endorsed mercantile paper before maturity, is presumed in law to have acquired it *bona fide* and for valuable consideration; and the party who seeks to defend against it, by reason of some payment, set-off, or equity against the payee or some intermediate holder, is required to show that the holder did not give value for it, or to raise a presumption of that fact sufficient to require an explanation from the holder of the manner in which he received it.
2. A deed of trust, if properly recorded, is constructive notice of the lien in all contests respecting the property; but this constructive notice does not run with mercantile paper, secured by the deed, so as to charge a *bona fide* holder before maturity with knowledge of its recitals; if there is nothing on the face of the paper itself which could give the holder such notice, or put him upon inquiry, he cannot be affected by any payments, discounts, sets-off or equities existing between the antecedent parties.

APPEAL from the Chancery Court at Montgomery.
Heard before the Hon. J. W. LESESNE.

THIS bill was filed by the appellants, on behalf of themselves and the other creditors of Oliver Reed, deceased, against his heirs-at-law and administrator, to set aside certain alleged fraudulent conveyances made by their debtor in his lifetime. The complainants' debt, as evidenced by the exhibit to their bill, was a promissory note for $955, executed by said Oliver Reed and one J. S. Carter, due the first day of January, 1838, negotiable and payable at the Branch Bank at Mobile, to the order of John H. Thorington, by whom it was endorsed in blank; but the bill does not anywhere allege the time at which the complainants became the holders of said note.

The defendants set up several distinct defences to the bill, alleging, among other things, that the note which the complainants held against said Oliver Reed, with others of even tenor and date, was given for the purchase money of a tract of land sold by said Thorington to said Reed and Carter; that said vendees, at the same time, executed to said Thorington a deed of trust, or mortgage, containing a power of sale, to secure the payment of said notes; that under said

power of sale, said Thorington sold said land at public auction, for a sum exceeding the aggregate amount of the notes then due and unpaid; and respondents insist that this operated a payment and extinguishment of said notes. The defendants admitted, that the note on which complainants founded their bill was, after its maturity, in the hands of said complainants, or their attorney; "but at what particular time—whether before or after its maturity—said note came to the hands of complainants, defendants neither know, nor have any information, and therefore can express no belief on that point."

A letter from Henry B. Holcombe, assistant commissioner of the Branch Bank at Mobile, to one of the attorneys in this case, which was, by consent of the parties, "considered and treated as his deposition, subject to objection on the ground of the irrelevancy of the testimony," gives the following "history of the note," held by complainants, "as shown by the records of said Bank:" "It was received from the Mechanics' Bank, New York, for collection, and entered on the books on the 29th December, 1837; protested for non-payment on the 4th January, 1838, and enclosed in a letter to John Leonard, Esq., cashier, by D. H. Burke, clerk of the Bank, on the 5th January, 1838. John W. Townsend was the notary public of the Bank at the date of the maturity of the note; but I am without the means of declaring from the record that he protested it: it may have been protested by some other notary, though it is highly probable the regular notary of the Bank did it. Mr. Townsend is dead. I hope the information furnished may be sufficient, as it is all the books appear to contain in reference to the note."

The chancellor held, that the sale under the deed of trust by Thorington constituted a full and complete payment of the note; and he therefore dismissed the bill, with costs.

The decree of the chancellor is now assigned for error.

MARTIN & BALDWIN, for the appellants.

WILLIAMS & COCKE, and BELSER & RICE, *contra*.

CHILTON, C. J.—The decree of the chancellor in this case cannot be supported. It is shown that, when Thorington sold the lands embraced in the mortgage, and indeed before

this note fell due, he had parted with this paper, and that it had come to the possession of the appellants. The letter of H. B. Holcombe, which is admitted as evidence, shows that the paper, which is mercantile, had been endorsed by Thorington to Minell & Co., and had been deposited in the Bank at which it was payable by their endorsee, the Mechanics' Bank of New York, on the 29th December, 1837, two days before its maturity; and that after it was protested, it was returned, on the 5th January, 1838, to said Mechanics' Bank. Now, it is well settled, that where a party shows he is the holder of endorsed mercantile paper before it falls due, the law presumes he holds it *bona fide* and for a valuable consideration, and requires the party who seeks to defend against it, by reason of some equity, set-off, or payment, existing against, or made to the payee, or some intermediate holder, to show that the holder did not give value for it, or to raise a presumption of that fact, requiring an explanation of the manner in which he acquired it.

In the case of Swift v. Tyson, 16 Peters 1, this doctrine is distinctly asserted, and is classed among the fundamentals of the law, and it is affirmed by this court in Pond v. Lockwood, 8 Ala. 674. As there is not a particle of evidence in this record that Minell & Co. did not give value for this note, and as the law implies they did give value in the absence of rebutting testimony, it follows that, in legal contemplation, they were the *bona fide* holders of this demand, (having acquired it before it fell due,) when it is alleged that payment was made to Thorington, and that such payment cannot be set up against them.

The position that the deed gave Thorington power to pay himself by a sale, and that the appellants held the note subject to this power, cannot be supported. The deed, properly recorded, was constructive notice *as to the lien* upon the property in all contests as to *it;* but that it should run with mercantile paper, and constructively charge all persons with a knowledge of its recitals, so as to affect the rights of *bona fide* holders of such paper, is a proposition to which we cannot subscribe. In the mercantile world, parties negotiate upon the faith of rights which result from the face of the paper itself and the genuineness of the signatures. If they receive

it in due course of trade, before it falls due, and are thus *bona fide holders* for value, and the face of the paper shows nothing which could give them notice, or put them upon inquiry, they are exempt from payments, discounts, sets-off, or equities, existing between the antecedent parties.

As the court is not full, (Justice Goldthwaite not sitting in this cause,) and Justice Ligon is on the eve of quitting the bench, I have not time allowed me to give the other questions presented by the argument of counsel the consideration they deserve; and as they were not decided by the chancellor, and may possibly be made to assume a different shape in the court below upon another trial, we have deemed it proper to confine our opinion to the question of payment, as to which we entertain no doubt.

Let the decree be reversed, at the cost of the appellees.

ELLSWORTH *vs.* TARTT.

1. If the several proprietors of different portions of a public line of travel, by agreement among themselves, appoint a common agent at each end of the route, to receive the fare and give through tickets, this does not, of itself, constitute them partners as to passengers who purchase through tickets, so as to render each one liable for losses occurring on any portion of the line.

ERROR from the Circuit Court of Montgomery.

Tried before the Hon. ROBERT DOUGHERTY.

ACTION ON THE CASE against a common carrier, to recover damages for the loss of plaintiff's trunk and its contents. The facts proved on the trial, so far as they are material to an understanding of the case as here presented, were as follows: The plaintiff, in traveling from Mobile to Charleston, purchased at the stage-office in Montgomery a through ticket from that city to Charleston, and traveled by railroad to West-Point, the eastern terminus of the road; at that point the passengers, with their baggage, were transferred to coaches, in which they proceeded towards Atlanta, Georgia;

on arriving at Lagrange, Georgia, the coaches were changed, and on reaching a station beyond that place it was discovered that plaintiff's trunk was missing. The plaintiff was traveling under the charge of Mr. Pratt, and the defendant was on the line at the time. Mr. Pratt informed the defendant of the loss of the trunk, as soon as it was discovered; and the defendant thereupon told Pratt that he was one of the proprietors of the line of coaches, promised to have diligent search made for the trunk, and wrote his name across a memorandum containing a list of the articles in it. The defendant was the proprietor of the line of coaches which ran between West-Point and Lagrange, while the route between Lagrange and the station at which the loss of the trunk was first discovered was owned by Peters & Beman; and the bill of exceptions states, that the "evidence tended to show that the said Peters & Beman's line was separate from that of defendant—that defendant had no interest in their line of coaches and horses, and that they had no interest in his line." There was evidence, also, tending to show that plaintiff's trunk was lost beyond Lagrange, on that portion of the line which was owned by said Peters & Beman.

The court charged the jury, "that if they believed from the evidence that plaintiff left Montgomery, in this State, for Charleston, South Carolina, and traveled with a through ticket, and that defendant received, or was to receive, under any contract or agreement, any part of the money paid for said through ticket by plaintiff, and that defendant was the proprietor of any portion of the route over which plaintiff traveled in going to Charleston, then the defendant was, as to the plaintiff, a co-partner with the proprietors or owners of the other portions of the route; and that if plaintiff's trunk contained her baggage, and was lost on any portion of the route between Montgomery and Charleston, then defendant was liable to plaintiff for the value of the trunk and its contents." To this charge the defendant excepted, and he now assigns it for error.

NAT. HARRIS, for the appellant:

To charge the defendant with the loss of plaintiff's trunk and its contents, it was necessary for the plaintiff to show,

either that they were lost by the defendant, or that he was a co-partner with the person by whom they were lost. The mere fact that the several proprietors of the different portions of the route for transporting passengers between Montgomery and Charleston employed the same agent to collect their fare, did not make them all partners, either amongst themselves, or as to third persons: there was no communion of profits between the several proprietors.—Collyer on Partnership, §§ 18, 21, 22; Porter v. McLure and Tourtellot, 15 Wend. 187; Jackson v. Robinson, 3 Mason's R. 141.

WATTS, JUDGE & JACKSON, *contrà*:

The evidence tended to show that the defendant was interested in the proceeds of the through ticket to Charleston; and the fact that he owned the coaches and horses of a portion of the route only, did not, as to third persons, destroy his liability as a partner with the proprietors of the other portions: the through-ticket arrangement made him liable to any passenger bearing a through ticket.—Story on Bailments, § 506; Champion v. Bostwick, 18 Wend. 175; Bostwick v. Champion, 11 *ib.* 580; Fairchild v. Slocum, 19 *ib.* 329. If Ellsworth was not interested in the through ticket, why did he not demand pay of the passengers? He was on the line at the time of the loss: he made no objection to the through ticket, but recognized his liability in case of loss; he told the witness Pratt that he was interested "in the line", and wrote his name on the list of articles in the trunk, for the purpose of showing the passenger to whom to look in case of the ultimate loss of the trunk.

GOLDTHWAITE, J.—The record shows that, on the trial below, the evidence established the fact, that the plaintiff purchased a through ticket from Montgomery to Charleston, and that over a portion of the route between those points, the defendant (Ellsworth) was the proprietor of a line of stages; and it further shows that, by virtue of such ticket, he recognized the right of the plaintiff to be carried as a passenger in the stages over his part of the route. Upon this evidence, we regard the charge of the court as asserting the proposition, that if the defendant was to receive any portion

of the money paid for the through ticket, it made him a partner with all the other proprietors along the entire route, and rendered him responsible for losses occasioned by the negligence of any one of them.

The general rule is, that to constitute a partnership *inter se* between two or more, there must be a joint understanding or agreement, the effect of which is to make each a participator in the profits and losses.—3 Kent's Com. (7th ed.) 20; Gow on Part. pp. 14, 15; Post v. Kimberly, 9 John. 495. But individuals, although not partners as between themselves, may occupy a position which renders them liable to third persons as such; as where two or more hold themselves out to the public as joint partners, and are trusted as such; or where there is a participation in the profits as principals, although by agreement between themselves they are not *inter se* to be liable as partners.—Bostwick v. Champion, 11 Wend. 572; S. C. 18 *ib.* 175. And in some cases it has been held, that an agreement, by which one is to receive an interest in the profits by way of compensation for his services, makes him a partner as to third persons (Grace v. Smith, 2 W. Black. 998, 1000; *Ex parte* Rowlandson, 1 Rose. 89 to 91; *Ex parte* Langdale, 18 Ves. 300; Dob v. Halsey, 16 John. 34); but it is very questionable if the rule can be sustained to that extent.—Story on Part. § 36 *et seq.*; Rice v. Austin, 17 Mass. 97; Muzzy v. Whitney, 10 John. 226; Loomis v. Marshall, 12 Conn. 69; Turner v. Bissell, 14 Pick. 192; Vanderburg v. Hall, 20 Wend. 70; Rawlinson v. Clarke, 15 Mees. & W. 292.

The case at bar comes up to neither of these propositions. The liability of the appellant as a partner, by the charge of the court, was to depend solely upon the fact of his having the right to receive any portion of the money paid for the through ticket. Suppose the different proprietors along the route came to the understanding to appoint a common agent at each end, to receive the fare of each from passengers going through, and to give a receipt, or through ticket; it is very clear that such an agreement would not constitute a partnership *inter se*, or as to third persons, and yet each proprietor would have the right to receive his proportion of the fare; there would be, in such

case, no community of interest, either in the property, or the profits.

In the case of Bostwick v. Champion, *supra*, the facts were, that the defendants were engaged in running a line of stages from Utica to Rochester, the entire route being divided into sections; the occupants of each section provided their own carriages and horses, and employed their own drivers, and paid the expenses of their separate section and the tolls at the turnpike gates; and the money received as the fare of the passengers over any portion of the line, after deducting such tolls, was divided among the occupants of the several sections, in proportion to the number of miles run by each. Judge Nelson, who delivered the opinion of the Supreme Court, held that the defendants were partners as to third persons, on the ground of community of profits: that the effect of the agreement was the same "as if each proprietor had put in a capital equal to the value of their coaches and horses, and, after deducting the expenses of running them from the aggregate receipts, divided the profits"; "that the proceeds of the aggregate route were thrown into a common fund and divided." The case was removed to the Court of Errors, the opinion there being placed upon the same ground by Chancellor Walworth, who concedes that "the case would be entirely different, if each stage owner was to receive and retain the passage money earned on his part of the line, and sustain all the expenses thereof, and was only to act as agent for the others in receiving the passage money for them, for the transportation of passengers over their parts of the line: in that case, there would be no joint interest, and no liability to third persons as partners." In the case at bar, there was no community of interest in the property of the entire route, so far as the record discloses; and the right of the defendant, under an agreement with the other proprietors, to receive his fare for his part of the route, out of the money paid to a common agent for a through ticket, would not make him in any sense a participant in the profits of the entire route, and for that reason would not render him liable to third persons as a partner.

The case of Fairchild v. Slocum, 19 Wend. 329, relied on by the appellee, has no application whatever. There, the

defendants were common carriers, and their undertaking was to carry the goods from New York to Ogdensburg. The contract which they entered into regulated their liability, which was not changed by the fact that they employed the vessels of other persons along all, or any portion of the route. If the defendant (Ellsworth) had contracted to carry the plaintiff to Charleston, the cases would have been analogous.

From the views we have expressed, it follows, that the charge given by the court was erroneous; and, as the case stands, it would be premature to consider the other questions raised.

Judgment reversed, and cause remanded.

MARTIN'S HEIRS *vs.* TENISON ET AL.

1. A bill in chancery, which was filed by the heirs-at-law of a decedent, seeking to hold the defendant a trustee for their benefit of the legal title to a certain tract of land to which (they averred) their ancestor had a pre-emption right at the time of his death, and to which the defendant, by fraudulently colluding with one of the heirs, afterwards acquired a patent,—*held*, defective on demurrer, because it did not allege, 1st, that the time limited by the acts of Congress for their ancestor to make his entry had not expired when the defendant entered the land; 2d, that complainants were able and willing to enter the land if it had not been entered by the defendant, or that they were prevented from doing so by his entry; and, 3d, a tender of the money expended by defendant in making the entry, or a willingness and readiness on the part of complainants to re-pay it.

APPEAL from the Chancery Court of Cherokee.
Heard before the Hon. JAMES B. CLARK.

JAMES B. MARTIN, for the appellants.
MATTHEW J. TURNLEY, *contra*.

CHILTON, C. J.—The bill in this case contains no equity, and was properly dismissed by the chancellor on this ground. It is filed by the heirs-at-law of Samuel Martin, to have

Matthew Tenison decreed to hold the S. W. fractional quarter of section 36, township 9, range 10, east, in Cherokee county, as trustee for their benefit, upon the ground that their ancestor, the said Samuel, was entitled to a pre-emption of it under the acts of 1838 and 1840, in virtue of his having settled upon it in 1833, made improvements, and his continued residence down to his death in 1840, he being the head of a family and a citizen of the United States. It is averred, that after Samuel died, without having perfected his title by entry, his son, George A., administered, and without authority sold the pre-emption right, bought it in himself, and by an agreement with Thomas Tenison, in consideration of $1,000, sold it to Matthew Tenison, fraudulently agreeing to become a witness to establish it for the latter in the land-office; that Matthew, in 1842, entered it under the act of 1841, (the said George testifying for him,) and soon after acquired a patent from the United States; that the whole arrangement was fraudulent and void; that said Matthew has had possession since his pretended purchase from George A. Martin. The bill then prays for an account of the rents and profits, and for a title to be decreed to the complainants, George being a party defendant with Tenison, the holder of the legal title. The demurrer for want of equity was sustained by the chancellor, who also passed upon the merits, holding that the complainants in neither aspect could recover.

The bill is defective in several particulars,—

1. It is not shown that the time limited in the acts for Samuel Martin to have made his entry had not expired before the land was entered by Matthew Tenison. In this event, Tenison could enter upon his own right of pre-emption, without invading any right of the complainants, or of their ancestor.

2. The bill fails to show any ability or willingness to enter the land, in the event it had not been entered by Tenison, or that they were prevented by his entry from doing so. It is said, we must presume the complainants would have accepted a benefit. How can we know it would have been beneficial to them? It is not even so averred.

3. There is no tender of the money which Tenison expended in entering the land, nor any willingness or readiness averred by the complainants in their bill to pay it. It is

argued that the rents of the land are sufficient to pay for it. This is not averred in the bill.

The case of Johnson v. Culbreath, 19 Ala. 348, is cited as an authority for dispensing with this last averment; but it is wholly unlike this case. There, an infant, who was one of several distributees, sought to have a re-division of some property which had been previously divided, but injuriously to him. No offer was made to account for the property he had received; but this it was clearly competent for the chancellor to order—indeed, the prayer for a more equitable division was equivalent to an offer to deliver up the property to be divided.

In the case before us, the effort is to have Matthew Tenison declared a trustee. Suppose the court should do so, and, on taking the account, the improvements should equal the rents; there is no offer to pay the money expended in making the entry, and, for ought the chancellor could know, there is no ability to pay; for what does not appear, is as though it did not exist. The bill, then, would have to be dismissed, the complainants having speculated on the jurisdiction of the court. This is not permitted. It is an elementary principle in equity, that a person who seeks relief in a court of chancery must himself do what is equitable.—1 Story's Eq. Jur., § 64 c; 1 Daul. Ch. Pr. 441, n. 4. It is, therefore, required in cases like the present, that the complainants should, by their bill, offer to pay whatever sum is admitted to be due to defendant, or to do whatever the court may consider necessary to be done on their part, towards making the decree which they seek just and equitable with regard to the other parties to the suit.—See same authorities. It is upon this principle, the courts of equity uniformly hold, that where a bill is filed to avoid usury, the complainant must pay, or offer by his bill to pay to the defendant, whatever sum is *bonâ fide* due to him; and if no such offer is contained in the bill, it is demurrable. 1 Story's Eq. Jur. § 301; 6 Gill & John. 103; 1 Paige 429; 5 Johns. Ch. R. 142-143; 1 Daul. Ch. Pr. 142-143, and n. 3; Nelson & Hatch v. Dunn, 15 Ala. 501-515.

Without noticing other objections made to the bill, these three are sufficient to sustain the chancellor's decree. It is therefore affirmed.

EASTMAN *vs.* HOBBS.

1. If the parties to a pending suit, under the mistaken impression that the costs have been adjudged against the defendant, enter into a verbal contract, by which plaintiff agrees to pay the costs in the first instance, and defendant promises to re-pay them, and also the note on which the suit is founded, and which he admits to be just, in good accounts due the first day of January next thereafter, the promise is binding, and its validity is not affected by the mistake.
2. And if the plaintiff, on the verbal agreement being afterwards reduced to writing, fails to inform the defendant of the mistake, and conceals from him the fact (which he had himself discovered, and of which he knew defendant was still ignorant) that he had taken a nonsuit, this does not amount to a fraud on the defendant, nor enable him to avoid the written contract.

APPEAL from the Circuit Court of Morgan.

Tried before the Hon. JOHN E. MOORE.

COVENANT by James S. Eastman against James R. Hobbs, to recover damages for defendant's breach of his writing obligatory, of which the following is a copy :—

"An article of agreement, made and entered into, by and between Jas. R. Hobbs and Jas. S. Eastman, this 19th day October, 1851, both of the State of Alabama, Morgan county, witnesseth, that the said Hobbs agrees to pay to said Eastman a certain note, with interest and cost that hath accrued up to this date, on which note said Eastman brought suit before William Ryan, and the said Hobbs appealed to the Circuit Court; and the said Eastman agrees to take good accounts from the said Hobbs in payment of the above-named suit, which accounts are due the first day of January next; and if the said Eastman should fail to collect any of the accounts, then Hobbs agrees to furnish others, until debt, interest and cost are satisfied, which the said Hobbs agrees to furnish next week. For the faithful performance of the above agreement, we hereunto set our hands and affix our seals, the day and year above written.

"J. R. Hobbs [seal].

"Jas. S. Eastman [seal]."

The breach assigned in the declaration was, the failure to

deliver the accounts. The defendant pleaded, payment, no consideration, failure of consideration, fraud, performance, no demand, deceit, and duress; and issue was joined on all these pleas.

On the trial, after the plaintiff had read in evidence the writing which was the foundation of the action, he next offered a transcript of the suit therein referred to, and the note on which it was founded, with the endorsement thereon. This note, which was for $48, was signed "J. R. & J. B. Hobbs," dated May 28th, 1850, and payable on the 25th of December next after date to James McNure, or order, by whom it was assigned to said Eastman for value received. The transcript showed that suit was instituted on this note before a justice of the peace, in the name of the payee for the use of Eastman; that the justice rendered judgment for the plaintiff, and the defendant appealed to the Circuit Court, where the plaintiff took a nonsuit.

"The plaintiff then proved the amount of costs in said suit, and also introduced proof tending to show that he had demanded of the defendant the accounts mentioned in said writing obligatory. The defendant then introduced a witness, who testified, that on the day of the date of said writing obligatory, which was Saturday, plaintiff and defendant went to his house to an early breakfast; that they told witness, that plaintiff had gone to the defendant's house by day-light, or perhaps a little before; that plaintiff and defendant lived four or five miles apart; that defendant told witness, that he had agreed to pay plaintiff the amount of said note and the costs of said appeal suit, in good accounts, that plaintiff was to pay said costs in cash, and defendant was to pay plaintiff in accounts, and that they were to meet at the house of witness that morning, the defendant to deliver (and plaintiff to receive) said accounts in payment of said note and bill of costs; that defendant was not then ready to deliver said accounts, and begged further time thereupon, to which plaintiff assented, but insisted that their said agreement should be reduced to writing and signed by both parties; that defendant then asked witness to write out said agreement, which witness finally did under the dictation of both parties, which resulted in the obligation sued on in this action. He

further stated, that plaintiff told him, before said agreement was written out, that said appeal suit had been decided against him, and requested witness not to tell defendant of that fact; that witness did not tell defendant, and that he did not believe defendant knew how said suit had been decided; and that plaintiff and defendant had left the court before it was finally decided.

"Defendant introduced another witness, also, who testified, that he told plaintiff on Friday evening that said suit had been decided against him; also, another witness, who testified, that plaintiff was at his house on Friday evening, and that after the arrival of the last witness, and a conversation between him and plaintiff, plaintiff said he was sick, and went home; also, another witness, who testified, that plaintiff told him that the defendant had agreed to pay said note and bill of costs in accounts, and that he had got defendant to sign said obligation without telling him that said appeal suit had been decided against him (plaintiff), and that he thought defendant did not know it had been so decided. Defendant introduced another witness, also, who testified, that he was present when said appeal suit was tried; that on said trial, the defendant moved to exclude said note from the jury, because on the back of it the payee had assigned it to the plaintiff; that plaintiff then struck out said assignment, and the court then permitted said note to be read to the jury; that the presiding judge said he would render a judgment in plaintiff's favor, but forebore to do so to allow defendant's attorney to produce authorities to show that he could not render a judgment in favor of plaintiff in such a case; that after this, upon the production of authority, the court changed its opinion, and thereupon plaintiff's attorney took a nonsuit. Another witness testified, also, that plaintiff told him on said Friday that he had got a judgment against defendant on said appeal suit.

"Plaintiff then introduced witnesses, who testified, that they were in court when said appeal suit was tried; that it was tried on Wednesday; that immediately after the trial plaintiff and defendant went out together, when the defendant exulted much at the result because he had got off his endorser, but said that the debt was just and he would pay it, and then proposed to plaintiff to pay said note and costs of suit in good

accounts, which proposition plaintiff accepted, and they then agreed that they would meet at the house of defendant's first witness on the next Saturday morning, and defendant would then deliver (and plaintiff receive) in discharge of said note and bill of costs good accounts on the first of January thereafter; that plaintiff and defendant both left (for) home on the same evening, and that after they had left (perhaps on the next day, or the day after) the court so changed its opinion, and plaintiff's attorney took said nonsuit; that at the time of making said verbal agreement, the presiding judge had not changed his opinion that judgment should go for the plaintiff, and did not so change his opinion until after the parties had left town under the impression that judgment had been rendered in favor of the plaintiff.

This being all the proof in this cause, plaintiff asked the court to charge the jury, that if they believed that the *contract to pay the note and costs of said appeal suit whilst said suit was pending (?)*, and the making of this obligation (the foundation of this suit) was not a new contract, but was merely carrying out the contract and agreement made whilst the suit was pending, then plaintiff was entitled to recover. This charge the court gave, but qualified it by adding, that if they believed that the parties, at the time the contract was first spoken of and agreed upon, respectively understood and believed that the costs were adjudged against Hobbs, and if they should also believe that it was owing to such understanding and belief that the agreement was entered into between them, and that Eastman afterwards, knowing that Hobbs had made the first agreement induced by such belief and misapprehension, artfully concealed, on the occasion of afterwards reducing it to writing, the fact that the costs had been adjudged (against) himself by the court, knowing at the time that Hobbs was entering into the written contract in utter and entire ignorance of the true facts of the case, and under the further belief and knowledge that Hobbs would (*not ?*) enter into such contract were he placed in possession of the facts as they existed,—that they might, in settling the question of fraud, weigh these circumstances, and give what weight they pleased to them; to which opinion of the court, in thus qualifying the charge asked, the plaintiff excepted.

"Plaintiff further asked the court to charge the jury, that under all the facts in this case, plaintiff was under no legal obligation to tell defendant that he had taken a nonsuit, and that a judgment for costs had gone against him, when defendant signed the obligation sued on; which charge the court gave, but qualified it by charging, that if they believed that plaintiff, at the time of the execution of said obligation, artfully and fraudulently concealed from defendant the fact that a judgment for the costs had been rendered against him (plaintiff),—this was a circumstance which they might weigh in determining the question of fraud; to which opinion of the court, in thus qualifying the charge asked, the plaintiff also excepted."

The rulings of the court in the charges are now assigned for error.

Robinson & Jones, for the appellant:

The evidence shows that Hobbs admitted the justness of the note first sued on, and this shows that the whole contest was about the costs. Admit that Hobbs was not bound to pay the costs; that, at most, would only amount to a partial failure of consideration, while the qualification to the first charge asked made it cover the whole consideration. But when the parol agreement was made, no judgment had in fact been rendered—the court only delayed its judgment; and therefore it could not then be known who was bound to pay the costs. The parol agreement, made while matters were thus suspended, put an end to the whole litigation: Eastman undertook to pay the costs in the first instance, and Hobbs undertook to re-pay them and the debt in claims upon others. Under this agreement, Eastman was bound to take either a nonsuit or a dismissal: he could not have taken a judgment for debts or costs, without a violation of his contract. That he afterwards took a nonsuit, was but a compliance with his contract, and a part performance of it; and as he was under no legal obligation to inform Hobbs of that fact, his failure to do so could not amount to a fraudulent concealment.

D. C. Humphreys, *contra*:

1. At the time the parol agreement was made, both parties

thought that the defendant was under a legal obligation to pay the costs; and if there had been no subsequent concealment, or other fraudulent act on the part of the plaintiff, this mistake would have released defendant from his promise, as a failure of the consideration in a material point will rescind the contract *in toto*.—Story on Contracts, § 481; Parsons on Contracts, pp. 362-3; Cabot v. Haskins, 3 Pick. 83; Warder v. Tucker, 7 Mass. 449; 4 *ib.* 347.

2. The subsequent written agreement was not only without consideration, but void for fraud. At the time it was entered into, Eastman knew that judgment for costs had gone against him, while Hobbs did not know it, and Eastman knew that Hobbs did not know it, and even requested the witness not to tell him the truth. This suppression of a material fact was a fraud, which vitiated the contract.—Parsons on Contracts, pp. 460 to 467; Huckabee v. Albritton, 10 Ala. 657; Jackson v. Sternberg, 20 Johns. 49; Hazard v. Irwin, 18 Pick. 107; 14 Wend. 195; Story on Contracts, p. 446; Meredith's Emerigon on Insurance, p. 17, ch. 1.

GOLDTHWAITE, J.—We think the question, whether the court erred in its charges to the jury, is determined by settling the validity of the verbal agreement first entered into by the parties. In relation to this contract, conceding that Hobbs, at the time of its making, believed that a judgment had been rendered against him for the amount of the note and costs, and would not have made it had he not believed such was the case; still, we are satisfied, under the facts disclosed by the record, it was binding upon him. So far as this agreement was concerned, there was no fraud practiced, nor any unconscionable advantage taken by the other party; but under the mistaken expression that the court had decided against him—a mistake as to a fact which he had the means of ascertaining—he agrees to pay the note in suit, which he concedes he owes, and the costs, an accounts due at a future day, to the other party, who is bound to take them in discharge of his debt, and to pay the costs. There is nothing in the evidence tending to show that Eastman was influenced by the supposed decision of the court in his favor, in entering into the contract, so that he would be bound by it. To hold

the one party to the agreement, and discharge the other, in a case where there was no fraud, would be manifestly unjust, and we have found no case going to that length. We agree, that if the subject-matter of the contract had no existence, then the mistake would entitle both parties to be relieved. But this is not the case: it is not pretended that the debt was not due from Hobbs, or that the costs had not accrued, or that he had not the means of ascertaining the real state of the facts. Under these circumstances, we are of opinion, that the mistake made by the appellee, in supposing that the case had been decided against him, when it had not been thus determined, has no influence upon the contract we have considered.

Regarding the verbal agreement as valid and effectual, the question then is, whether the conduct of Eastman, in concealing the fact that the costs had been subsequently adjudged against him, instead of the other party, could be properly taken into consideration by the jury, to avoid the effect of the written contract, either in whole, or in part. That Eastman took a non-suit, and that the costs were adjudged against him, had no effect whatever upon the verbal agreement, which had previously been entered into, we think clear. That fact would have furnished the appellee with no legal excuse for failing to comply with it; and there could, for that reason, be no legal obligation resting upon Eastman to inform him of it, so far as the rights of the parties depended upon the verbal agreement. The evidence incorporated into the bill of exceptions shows, that the written contract was nothing more than a reduction to writing of the terms of the agreement which had existed in parol only. In cases of fraudulent misrepresentation, the fraud must relate to something material, constituting an inducement, or motive to the contract, by which the party practiced upon is misled to his injury (Story's Eq. § 195); and when the misrepresentation is not material, or not followed by legal injury, however objectionable it may be in point of morals, the law, looking alone to practical results, gives no redress. If the verbal agreement was valid, a fact which could in no wise have affected its validity, could not properly be regarded as a legal inducement with the parties in reducing its terms to writing, or as the cause of

any legal damage to the party, as under the written agreement he is required to do no more than he is bound to do under the terms of the verbal contract.

From what we have said it is obvious, that the charges of the court, which authorized the jury to take into consideration the concealment of the fact referred to in the record, against the appellant, were erroneous.

Judgment reversed, and cause remanded.

NESBITT *vs.* McGEHEE.

1. When a contract under seal is materially varied by a subsequent valid contract, which is also under seal, a recovery cannot be had on a declaration which only sets out the first contract and its breach; and if the declaration sets up both contracts, alleging an appropriate breach, a plea of performance of the obligations imposed by the original agreement, which is silent as to the additional obligations created by the second agreement, is defective on demurrer.
2. A contract under seal contained these provisions: "The said M. covenants and agrees to deliver to the said N., at the water's edge, at his steam-mills at Cedar Bluff, all the stocks for string timber for the Memphis Branch Railroad, agreeably to the said N.'s contract, made January 18th, with the engineer of said road"; the stocks to be of a specified size and quality, and "the timber to be delivered as fast as required for sawing, say one hundred stocks per week, more or less, as may be necessary. * * * * And the said N., on his part, covenants and agrees to pay the said M., when the above contract shall have been faithfully complied with, at the following rates, to-wit, forty-five cents per stock; and that he will make his payments in the following manner—that is to say, on the twentieth day of every month during the progress of this contract, he will pay seventy-five per cent. of the relative value of such timber as may be delivered, until the whole of the timber herein contracted for shall have been delivered agreeably to contract, when the balance shall be forthwith paid to the said M.": *Held*, that the weekly delivery by M., at the specified place, from the date of the agreement until the next twentieth day of the month, of such a number of logs (not exceeding one hundred per week) of the specified size and quality, as was necessary to afford constant employment to N.'s steam-mills in sawing them during the usual working hours of each day of the week, was the first thing to be done under the contract—a condition precedent to N.'s liability to pay; and that M.'s failure to perform that act, was a breach of his covenant, and instantly vested a right of action in N.
3. A cause of action accruing from a breach of covenant, cannot be discharged

by any act of the plaintiff, short of a release, or the acceptance of something in satisfaction of that cause of action.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. JOHN E. MOORE.

COVENANT by Wilson Nesbitt against Nicholas McGehee, to recover damages for the defendant's breach of this contract:—

"Articles of agreement, made this 28th day of January, 1847, between Wilson Nesbitt, of the one part, and Nicholas McGehee, of the other part, *witnesseth*, That the said McGehee covenants and agrees to deliver to the said Nesbitt, at the water's edge, at his steam-mill at Cedar Bluff, all the stocks for string timber for the Memphis Branch Railroad, agreeably to said Nesbitt's contract, made January 18th, with the engineer of said road; the stocks to be of heart pine, and each eighteen feet and a half long, sufficient to make each piece of string timber eighteen feet long, and six by seven inches square, heart pine; the timber to be delivered as fast as required for sawing, say one hundred stocks per week, more or less, as may be necessary. And the said Nesbitt, on his part, covenants and agrees to pay the said McGehee, when the above contract shall have been faithfully complied with, at the following rates, to-wit, forty-five cents per stock; and that he will make his payments in the following manner—that is to say, on the twentieth day of each month during the progress of said contract, he will pay seventy-five per cent. of the relative value of such timber as may be delivered, until the whole of the timber herein contracted for shall have been delivered agreeably to contract, when the balance shall be forthwith paid to the said McGehee. Witness our hands and seals, the day and year above written.

Signed, sealed and delivered in presence of Joel Thorp, G. B. Duval. } N. McGehee [seal.] W. Nesbitt [seal.]"

It is further agreed to by the parties to the within contract, that each log of timber, as before specified, shall make at least four pieces of string timber, six by seven inches, of heart pine, and that when a log will make more than four pieces, that the said Nesbitt shall pay unto the said McGehee

for each piece over and above the four pieces, in the same proportion as is given per log. Witness our hands and seals, this 18th February, 1847.

Executed in presence of } N. McGehee [seal.]
Joel Thorp." } Wilson Nesbitt [seal.]"

The plaintiff declared on this entire contract, alleging as a breach the defendant's failure to deliver the stocks. The defendant demurred to the declaration, but his demurrer was overruled; and he then pleaded several pleas, of which it is only necessary to notice the three following:

"1. That he did deliver to the said plaintiff, at the water's edge, at his steam-mills at Cedar Bluff, all the stocks for string timber for the Memphis Branch Railroad, agreeably to said plaintiff's contract, made January 18th, with the engineer of said road; the stocks of heart pine, and each eighteen feet and a half long, sufficient to make each piece of string timber eighteen feet long, and six by seven inches square, heart pine; one hundred stocks per week, more or less, as was required for sawing, according to the form and effect of the said agreement in writing, and of the said covenant of the said defendant, by him in that behalf made as aforesaid; and of this the said defendant puts himself upon the county," &c.

"2. That he did, on the 20th day of ——, 1847, deliver to the said plaintiff, at the water's edge, at his steam-mills at Cedar Bluff, a large number of stocks for string timber for the Memphis Branch Railroad, agreeably to the said plaintiff's contract, made January 18th, with the engineer of said road, each eighteen feet and a half long, sufficient to make each piece of string timber eighteen feet long, and six by seven inches square, heart pine—to-wit, one hundred per week, more or less, as were required to saw, according to the form and effect of said agreement in writing, and of the said covenant of said defendant, by him in that behalf made as aforesaid; and defendant avers, that said plaintiff did not, nor would, pay to said defendant, on the said 20th day of ——, 1847, nor at any time thence hitherto, seventy-five per cent. of the relative value of said timber so delivered, according to the form and effect of said agreement in writing, in said plaintiff's declaration mentioned, and of the said covenant of said plaintiff in that behalf made as aforesaid, but to pay

the same, or any part thereof, said plaintiff has failed and refused, and still fails and refuses, contrary to his said covenant," &c.

"5. That he has well and truly kept and performed all and singular the covenants of him, the said defendant, by him in that behalf made as aforesaid, in said agreement in writing in said plaintiff's declaration mentioned, according to the form and effect of said agreement," &c.

A demurrer was interposed to the first and second pleas, which was overruled, and thereupon issue was joined on them, as also on the fifth plea; and a trial was had on these issues.

The plaintiff read to the jury the articles of agreement between himself and the defendant, and also the contract, therein referred to, between himself and the engineer of the railroad. He also introduced evidence, showing that he had made a contract with one E. E. Boyett, on the 21st April, 1847, for the superintendence of his mills and the sawing of the stocks which were to be there delivered; that his mills were capable of sawing six thousand feet per day, and, in consequence of defendant's failure to deliver the stocks as stipulated, his mills were idle for some length of time; that defendant did not deliver any stocks until May 9th, 1847, and then delivered, in the course of one month and seventeen days, about two hundred and fifty stocks, of which only fifty were large enough to make four pieces of string timber of the specified size; "but all of them," the bill of exceptions states, "were received and used by plaintiff in sawing string timber." There was proof, also, "conducing to show that defendant refused to deliver any more stocks, and assigned as a reason for so doing that he would lose money by it—that the stocks required were so large that he could not make anything by furnishing them, and that he should not do it; but there was a conflict of testimony on this point." Plaintiff further proved that he had made a contract with the captain of a steamboat on the Coosa river for the transportation of the string timber to Rome, Georgia, and another contract for the laying of it along the line of the road; that if defendant had at once entered on the performance of his contract, in February, 1847, and had delivered as much as one hundred stocks

per week, that the string timber might have been cut and delivered at Rome before the boating season was over, for that portion of the road which plaintiff had contracted to supply, and might have been laid along the line of the road agreeably to his contract with the engineer; that by reason of defendant's failure to deliver said stocks pursuant to his contract, he had been compelled to pay out, for furnishing string timber to the road, increased cost of transportation, laying the timber along the line of the road, &c., a larger sum of money than he received from the road under his contract. There was proof, also, of the amount of damages plaintiff had sustained: "but there was no proof," as the bill of exceptions states, "that plaintiff paid, or offered to pay, or that he was ready, willing, or able to pay defendant, for the stocks delivered."

The court charged the jury, at the request of defendant,—"That if they believed from the evidence that the contract sued on was made on the 18th February, 1847, and that by its terms defendant was to deliver stocks to plaintiff, one hundred per week, more or less, as was required for sawing; that plaintiff's contract with said Boyett, for the sawing of the string timber, was made on the 21st April, 1847; that defendant entered upon the performance of his contract on the 9th May, 1847, and plaintiff received the logs delivered, without objection, and used said stocks for string timber; that defendant continued, at intervals, to deliver stocks during the term of one month and seventeen days, from the 9th May, 1847, and that plaintiff received and used the stocks so delivered,—in that case, plaintiff was bound to pay defendant, on the 20th May, 1847, for the stocks delivered up to that time, according to his contract, and was also bound to pay, on the 20th June, 1847, for all stocks previously delivered and not paid for according to his contract, seventy-five per cent. of the relative value of the stocks previously delivered; and that if plaintiff failed to pay defendant, defendant might abandon his contract, and plaintiff cannot recover against him;" and to this charge the plaintiff excepted.

The overruling of the demurrers to the first and second pleas, the charge given, and the refusal to give a charge requested, are now assigned for error.

D. W. BAINE and JAS. B. MARTIN, for the appellant:

1. The first plea was defective, and the demurrer to it should, therefore, have been sustained. It purports to be a plea of performance, and ought to answer the entire action. 1 Chitty's Pl. 523. But, while the declaration counts upon a breach of the entire contract (original and amended), the plea avers performance of the original contract only: the amended contract bound the defendant to deliver stocks which would each make four pieces of string timber of the required size, while the plea only alleges a performance by the delivery of logs sufficient to make each piece of string timber of the required size.

2. The second plea is demurrable for the same reason, and also because it does not aver that defendant was ready and willing to carry out the contract on his part. Nor can the plaintiff's failure to pay, as averred in that plea, be treated by defendant as a failure to perform a condition precedent.—Duke of St. Albans v. Shore, 1 H. Bla. 271; Boone v. Eyre, *ib.* 273, n. a.; Campbell v. Jones, 6 Term R. 573; Havelock v. Geddes, 10 East's R. 556. The covenants being independent, the defendant is not released from his obligations until the contract is rescinded (Clay v. Dennis, 3 Ala. 375); and as the plea does not aver a rescission of the contract, it is for that reason also defective.

3. The charge of the court cannot be sustained. As no time was specified for the commencement of the delivery of the stocks, the law implies that it was to be commenced within a reasonable time (Drake v. Goree, 22 Ala. 409); and the 9th May was an unreasonable time to commence a contract made on the 18th February. This breach of contract on the part of defendant gave plaintiff the right to abandon it at once, and vested in him a cause of action which was not discharged by a subsequent delivery of a portion of the stocks, as there is no proof that they were received in satisfaction of the contract.

M. J. TURNLEY, *contra*, contended, 1st, that the demurrer to the pleas should have been visited on the declaration, which (he insisted) was fatally defective in several particulars; 2d, that the overruling of the demurrer, even if erroneous,

was not a reversible error, as the defendant had the benefit of the same defence under the fifth plea (Stein v. Ashby, 24 Ala. 521); and, 3d, that the charge of the court, under the pleadings and proof, was correct (1 Selden's R. 247).

RICE, J.—Where a contract under seal is materially varied, by a subsequent valid contract under seal, the plaintiff cannot recover under a declaration which sets forth the former contract only, and a breach of it. His safe course is, to set forth both contracts, and an appropriate breach. McVay v. Wheeler, 6 Porter's R. 201; Barelli v. O'Conner, 6 Ala. 617.

The declaration in this case shows, that on the 28th day of January, 1847, the parties sealed and executed a certain agreement in writing, the terms of which are stated; and that on the 18th day of February, 1847, they sealed and executed an additional agreement, in relation to the subject-matter of the prior agreement, the terms of which are also stated. The declaration shows, that the right of the plaintiff to a recovery is founded on the breach by the defendant of his covenants shown in the original and additional agreements above mentioned. The additional agreement (among other things) imposed an additional duty or obligation upon the defendant, to-wit, "that each log of timber before specified (in the original agreement) should make at least four pieces of string timber, six by seven inches, of heart pine." The two agreements together constitute the contract of the parties.

No plea to such a declaration can be good, which confines itself to an averment of performance of the obligations imposed upon the defendant by the original agreement, and is silent as to the additional obligation imposed upon him by the additional agreement. Every such plea must be held insufficient, upon the principle, that a plea which undertakes to answer the whole declaration, but in truth answers only a part of it, is bad.

It is unnecessary to say anything more as to the first and second pleas, to which demurrers were overruled by the court below; for it is clear, from what we have said, that the court below erred in overruling the demurrers to them.

The only other questions presented for our examination,

arise out of the charge given, and the refusal of the charge asked by the plaintiff; and to the discussion of these questions we now proceed.

The contract of the parties in this case is contained in the two aforesaid written agreements, both of which are set forth in the declaration and in the bill of exceptions. That contract fixes the order of time in which the acts of the parties were to be performed by them respectively: "The said McGehee covenants and agrees to deliver to the said Nesbitt, at the water's edge, at his steam-mills at Cedar Bluff, all the stocks for string timber for the Memphis Branch Railroad, agreeably to the said Nesbitt's contract, made January 18th, with the engineer of said road, the stocks to be of heart pine, and each eighteen and a half feet long, sufficient to make each piece of string timber eighteen feet long and six by seven inches square, heart pine; the timber to be delivered as fast as required for sawing, say one hundred stocks per week, more or less, as may be necessary"; and "each log of timber, as before specified, shall make at least four pieces of string timber, six by seven inches, of heart pine. And the said Nesbitt, on his part, covenants and agrees to pay the said McGehee, when the above contract shall have been faithfully complied with, at the following rates, to-wit, forty-five cents per stock; and that he will make his payments in the following manner—that is to say, on the twentieth day of every month during the progress of this contract, he will pay seventy-five per cent. of the relative value of such timber as may be delivered, until the whole of the timber herein contracted for shall have been delivered agreeably to contract, when the balance shall be forthwith paid to the said McGehee"; and "when a log will make more than four pieces, the said Nesbitt shall pay unto the said McGehee for each piece over and above the four pieces, in the same proportion as is given per log."

The numerous decisions on the vexed question of what are, and what are not, dependent covenants, cannot be reconciled. They all agree in one particular—that is, in the recognition of the universal rule, that the intent of the parties, to be collected from the contract itself and from a common-sense view of it, must control the court in determining whether the

covenants are dependent or independent. "Their precedency (said Lord Mansfield) must depend on the order of time in which the intent of the transaction requires their performance."

The parties have an undoubted right, if they please, to make their covenants dependent or independent *throughout*, or to make the covenants independent as to one thing, and dependent as to another. They have a right to mould their contracts so as to suit their mutual convenience and interests; and when the courts can ascertain their meaning, they are so to construe the contract as to give effect to that meaning, provided the purpose be lawful. They must be held to have intended the performance of their respective acts, in the order of time indicated by their covenants.—Cunningham v. Morrell, 10 Johns. R. 203; Grant v. Johnson, 1 Selden's R. 247; Drake v. Goree, 22 Ala. 409; Rives v. Baptiste, 25 Ala. 382.

The application of the rules of law above stated to the aforesaid contract of the parties, makes it manifest, that at least one act was to be performed by McGehee before any liability against Nesbitt could accrue under the contract:—that act was, the delivery during each of the weeks intervening between the 18th day of February, 1847, and the 20th day of March, 1847, at the specified place, of such a number of logs of the specified size and description (not exceeding one hundred per week) as was necessary to afford constant employment to the steam-mills of Nesbitt in sawing them during the usual working hours of each day of said several weeks (Sundays excepted). If that act was performed by McGehee, then, if Nesbitt failed to pay him the seventy-five per cent. of the value of the logs so delivered, (estimated according to the measure of value prescribed in the contract,) on the 20th day of March, 1847, such non-payment entitled McGehee to abandon the contract, if he chose to abandon it. But, if McGehee failed to perform that act, such failure was a breach of his covenant, and instantly vested a right of action in Nesbitt. Nesbitt was under no obligation to employ a sawyer, until after McGehee commenced delivering the logs according to the contract; and until McGehee commenced delivering logs, as required by the contract, it was immaterial to him whether Nesbitt had a sawyer, or whether Nesbitt's mills were actually at work; for he (McGehee) could and

should have commenced the delivery as he had covenanted to do, whether the mills were idle or at work, or whether Nesbitt had a sawyer or had not employed one. The delivery by McGehee, as herein above pointed out and described, was a *condition precedent*,—it was the first thing to be done under the contract.—Chitty on Cont. 635, 636; Lord v. Belknap, 1 Cushing's R. 279; Ennis v. O'Conner, 3 Harris & Johns. 163; Weaver v. Sessions, 6 Taunton's R. 155.

If a right of action vested in Nesbitt as aforesaid—that is, by the failure of McGehee to make the delivery aforesaid—then the rule applies, that the cause of action cannot be discharged by any act of the plaintiff, short of a release, or the acceptance of something in satisfaction of that cause of action. Leavitt v. Smith, 7 Ala. 182, and cases there cited; Baylis v. Usher, 4 Moore & P. Rep. 791; Willoughby v. Bockhouse, 4 Dowl. & R. Rep. 539; Bowman v. Teall, 23 Wend. 309; Spivey v. Morris, 18 Ala. 254.

Hence it is clear, that if McGehee failed to deliver any logs until the 9th day of May, 1847, or otherwise broke his covenant, he could neither bar this action, nor acquire a right to abandon the contract, by proving merely that on said last named day he entered on the performance of his contract, and continued at intervals to deliver stocks during the term of one month and seventeen days from that day; and that plaintiff received them without objection, and used them for string timber, and that plaintiff from thence hitherto has failed to pay anything for them. Whether such evidence may not go in reduction of damages, we are not now required to decide; but we hold, that it does not, *per se*, constitute a bar to this action.—Allen v. Greene, 19 Ala. 34.

We wish it noticed, that what we have above decided relates to *the contract itself, and the rules of construction applicable to that contract, as it came from the hands of the parties.* These rules of construction are sometimes confounded with the doctrine of waiver by matters *ex post facto.* As to this doctrine, we decide nothing at this time.—Grant v. Johnson, 1 Selden's R. 252; Lucas v. Godwin, 3 Bing. N. C. 737; Chitty on Cont. 634, 636; Wallis v. Long, 16 Ala. 738; Havelock v. Geddes, 10 East, 555; Story on Bail. § 441; Story on Cont. § 741.

We deem it unnecessary to give any particular examination to the charge asked and refused, or to express an opinion as to its correctness. The charge given was erroneous. For the errors of the court below in giving that charge, and in overruling the demurrers to the first and second pleas, its judgment is reversed, and the cause remanded.

INDEX.

ACTION.

1. A promise by defendant, upon valuable consideration, to give his daughter, who was plaintiff's wife, "a full share of his property, which then and there was worth $25,000," is too indefinite and uncertain to support an action under the Code.—Adams and Wife v. Adams, 272

2. *It seems*, however, that a promise by a father, upon valuable consideration, to make his daughter equal in property to his other children, (or to give her so much as would make her share equal to a given portion of his estate; as, one-fourth, one-fifth, &c.,) is sufficient to support an action, if the parties contemplated its present execution upon the performance of the consideration. 272

3. The rule of the common law, which stills prevails except so far as it has been changed by particular statutes, held a judge exempt from a civil suit or indictment, for any act done, or omitted to be done by him, when sitting as judge.—Hamilton v. Williams, 527

4. Under the statute which gives an action at law on the official bond of a county-court judge, "for any injury, waste, or damage sustained in any estate, in consequence of any neglect or omission of taking good and sufficient security from guardians, executors, or administrators," (Clay's Digest, p. 296, § 1,) no suit can be maintained on his bond for the failure of the judge to require a guardian to renew his bond, or to give further security, on account of the insolvency, removal, &c., of his original sureties. 527

5. Neither case nor assumpsit can be maintained to recover damages for the breach of defendant's duty and contract in not permitting plaintiff to cut and carry away timber, when the declaration shows that the injury complained of resulted from plaintiff's being enjoined and restrained by proceedings in chancery instituted by defendant: the only remedy is, an action on the injunction bond, if there is a breach of it, or an action on the case averring malice.—McLaren, Ragan & Co. v. Bradford, 616

6. An order of the probate court, made on the application of two co-executors, for the allowance to each of a specified sum as annual compensation for his services in the management of the estate, will

ACTION—CONTINUED.

not support an action at law in favor of one of them, or his assignee, against the other.—Carver v. Hallett, executor, &c., 722

7. A cause of action accruing from a breach of covenant, cannot be discharged by any act of the plaintiff, short of a release, or the acceptance of something in satisfaction of that cause of action.—Nesbitt v. McGehee, 748

AGENCY.

1. The general rule is, that to make the principal personally liable on a written contract made by his agent, it must be executed in the name of the principal, and appear to be his own contract; but there are many exceptions to this rule, one of which is, that a bill of lading, signed by the master of a vessel in his own name, in the usual course of employment, will bind the owner.—McTyer v. Steele, 487

2. A sealed instrument, in these words: "Twenty days after date I promise to pay to J. T., or order, $442, value received. Given under my hand and seal," &c.; and signed "B. W. [seal] agent for C. C.:" *Held* the obligation of B. W. only, and therefore not admissible evidence against C., when unaccompanied with the offer of extraneous proof explanatory of it.—Dawson v. Cotton, 591

3. When an agent is employed by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, (as to take personal property, which, although claimed adversely by another, he has reasonable ground to believe belongs to his principal,) the law implies a promise of indemnity by the principal, for such losses and damages as flow directly and immediately from the execution of the agency.—Moore v. Appleton, 633

4. The rule that contribution or indemnity will not be enforced between wrong-doers, does not apply to any case where the act of the agent was not manifestly illegal in itself, and was done in the *bona fide* execution of his agency, and without knowledge (either actual, or implied) that it was illegal. 633

AMENDMENT.

1. An amendment of the complaint, which would convert on action of detinue into an action of trover, cannot be allowed.—Harris v. Hillman, 380

APPEALS.

1. If the appeal bond, as set out in the record, describes a judgment materially different from that shown by the record to have been rendered in the cause, and does not show any undertaking for the costs of an appeal from the real judgment, it cannot be regarded as security for the costs, and the appeal will be dismissed.—Williams v. The State, 85

2. When plaintiff below is appellant, and assigns for error the overruling of his demurrer to the plea, the judgment will be reversed, and the cause remanded, if the plea is bad, although the complaint also was demurrable.—Adams and Wife v. Adams, 272

3. Where a decree in chancery, dismissing a bill as to both of the defen-

APPEALS—CONTINUED.

dants, was reversed on error, and the complainants held to be entitled to relief against one of the defendants, the costs of the appellate court were apportioned; one half being taxed against the complainants, and the other half against the unsuccessful defendant.—Tyus v. DeJarnette, 280

4. Evidence cannot be received in the appellate court to contradict the record in the primary court; nor will this court, on error, look to the American State Papers, as published under the authority of Congress, to show a mistake in the certified copy of a public document contained in the transcript.—Kennedy's Executor v. Doe ex dem. Rochon's Heirs, 384

5. The practice in appeals under the Code, where one defendant wishes to revise a judgment rendered against himself jointly with others, should conform to the former practice under writs of error: the appeal must be sued out in the name of all the defendants, after which there may be a summons and severance as to those who refuse to join; and after a severance, the party refusing to join will not be liable for the costs of the appeal, nor for the statutory damages on affirmance.—Moore v. McGuire, 461

6. When the judgment entry recites, that "the plaintiff came by attorney, and the defendant having failed to file his plea within the time prescribed by law, it is considered by the court, that the plaintiff have and recover of the defendant," &c., "the damages due by the two promissory notes declared on," it will be presumed on error, that the complaint shown by the record (although the day on which it was filed is not endorsed on it) was filed before the rendition of the judgment by default.—Letondal v. Huguenin, 552

7. When a bill is dismissed by the chancellor without a decision upon the merits of the case, and his decree is reversed on error, the safer practice is to remand the cause without determining its merits; thus enabling the parties to raise questions, and make motions, which may materially affect it, and which can only be made in the primary court.—Byrd v. McDaniel, 582

8. An opinion pronounced in a cause by the Supreme Court, must stand as the law of the case, both when remanded to the primary court for another trial, and when brought up a second time on appeal.—Wyatt's Adm'r v. Steele, 640

9. An appeal lies from a decree of the probate court, sustaining a demurrer to a petition filed, under the act of 1854, to compel a settlement from a personal representative of his intestate's administration on an estate, because of the failure to allege that assets of the first estate came to the defendant's hands; and dismissing, the petition with costs, on the petitioner's declining to amend.—Howard's Distributees v. Howard's Adm'r, 682

10. When the judgment entry recites, that the parties appeared by their attorneys and a trial was had on issue joined, while no complaint is found in the record, it will be presumed, on error, that the complaint was either dispensed with, or lost; and if the evidence set out in the record is sufficient to sustain an action in tort for the conversion of the property sued for, but not sufficient to support an action *ex con-*

APPEALS—CONTINUED.

tractu, it will be presumed that the action was in tort.—Allen v. Harper, 686

ARSON.

See CRIMINAL LAW, 28, 46.

ASSUMPSIT.

1. Money paid under a *pluries fi. fa.*, pending a motion to quash a previous execution on the ground of the defendant's discharge in bankruptcy, may be recovered in assumpsit after the rendition of a judgment quashing the writ, unless the party receiving it can show some equity, arising out of the same transaction, which justifies its retention.—Ewing v. Peck, 413
2. If the money was voluntarily paid after the return day of the execution, and under no mistake by the party paying it as to his rights, he cannot recover it; but it does not follow that the payment was voluntary, merely because it was made after the return day of the execution, when there was a subsisting levy on the defendant's land: whether it was voluntary or not, under such circumstances, is a question for the determination of the jury. 413
3. Neither case nor assumpsit can be maintained to recover damages for the breach of defendant's duty and contract in not permitting plaintiff to cut and carry away timber, when the declaration shows that the injury complained of resulted from plaintiff's being enjoined and restrained by proceedings in chancery instituted by defendant: the only remedy is, an action on the injunction bond, if there is a breach of it, or an action on the case averring malice.—McLaren, Ragan & Co. v. Bradford, 616
4. Assumpsit and case are equally maintainable, on the promise of indemnity which the law implies against a principal, for such losses and damages as flow directly and immediately from the execution of the agency, when the act itself is not manifestly illegal, and is not known by the agent to be wrong; but in either action the declaration must allege a breach.—Moore v. Appleton, 633

ATTACHMENT AND GARNISHMENT.

1. Process of garnishment does not lie against a public municipal corporation, to subject the salary of one of its police officers.—Mayor, &c., of Mobile v. Rowland & Co., 498
2. A garnishee answered, in writing, that the defendant in attachment, during the year previous to the service of the garnishment, had furnished him with $150 in money, and had given him his note for $51; that in consideration of said money and note, he agreed to enter a tract of land at the land-office for said defendant, and subsequently filed a land warrant in said office to be located for said defendant; that one of the officers doubted whether the location could be made in the form desired, and this caused a delay in the location; and that after the service of the garnishment he made no further effort to have the location made: *Held*, that the plaintiff

ATTACHMENT AND GARNISHMENT—CONTINUED.

in attachment was not entitled to a judgment against the garnishee on this answer.—Lundie v. Bradford, 512

3. Under the Code (§ 2570), in a suit commenced by attachment, a judgment by default cannot be taken on the first day of the term to which the writ is returnable; but if the suit is brought in either the Circuit or City Court of Mobile, and the attachment is levied more than twenty days before its return, judgment by default may be taken on the first day of the term under the provisions of the act of February 17, 1854, (Pamphlet Acts 1853-4, p. 91, § 6.)—Letondal v. Huguenin, 552

4. And if the attachment is not sued out against a non-resident, but is levied on the defendant's goods and chattels, and no garnishee is summoned, there is no law requiring any notice to be given. 552

5. When an attachment is sued out in a case not authorized by law, a motion to quash it is not the proper remedy, nor is the refusal to quash on motion revisable on error.—Gill v. Downs, 670

6. But if a motion to quash were proper in such case, the objection is waived by the failure to make it at the first term, and by afterwards appearing and pleading to the merits. 670

7. When a creditor files a bill in equity against his debtor under the act of 1840, giving an attachment in chancery in certain cases, the jurisdiction of the court is not limited to the condemnation of the property seized under the attachment: if its jurisdiction has once rightfully attached, the court may render it effectual to the complainant's relief, by sending out its process, upon a proper application, or widening the sphere of its action, so as to embrace and subject property enough to satisfy his demand.—Shearer v. Loftin, 703

BAIL.

1. A sheriff has no power under the Code to admit to bail a person charged with a felony after indictment found, nor can that power be delegated to him by an order of the Circuit Court in these words: "And it appearing to the court that the offence with which the prisoner stands charged, namely, murder in the second degree, is bailable, it is ordered that, upon the prisoner giving good and sufficient bail, according to law, for his appearance at the next term of this court, in the sum of $1,000, then said prisoner be discharged from custody until the next term of this court."—Antonez v. The State, 81

2. Section 3408 of the Code, requiring the magistrate to endorse on the warrant of commitment the amount of bail required, applies only to preliminary proceedings before indictment found, and not to commitments after indictment. 81

BANKRUPTCY.

1. A judgment quashing an execution, on the ground of the defendant's discharge in bankruptcy, although the court refuses to order satisfaction or discharge of the original judgment to be entered, or a perpetual stay of execution, relates back to the original judgment; and its effect, so far as respects the rights of the parties to that judgment, is to vacate all process issued for its satisfaction.—Ewing v. Peck, 413

BANKS.

1. The object of the act of February 12, 1843, "for the final settlement of the affairs of the Planters and Merchants' Bank of Mobile", was to obtain a dissolution of the Bank's charter agreeably to law; and although it provides for the institution of judicial proceedings against the Bank to obtain a judgment of forfeiture of its charter, and declares "that if no cause of forfeiture shall be found, this act shall have no force or validity," yet the Bank might dispense with the judicial proceeding by surrendering its charter and accepting the provisions of the act, and it was competent for the State, with the assent of the Bank, to resume its franchises at any time.—Savage & Darrington v. Walshe & Emanuel, 619
2. In a suit brought by a purchaser of negotiable paper at a sale of the Bank's assets, made by its trustees under the act of 1850, an allegation in the declaration that the charter was surrendered, but was continued by virtue of the provisions of the several acts for the settlement of the Bank's affairs, is not repugnant or contradictory, when construed with reference to those acts. 619
3. The fact that a note, taken by the trustees after the surrender of the Bank's charter, was made "negotiable and payable at said Bank", does not raise a legal presumption that it was discounted, instead of being taken in settlement of a debt due. 619
4. The power of sale conferred upon the trustees by the act of 1850 gave them, by necessary implication, the authority to transfer negotiable securities so as to pass the legal title to the purchaser by their assignment, and enable him to sue in his own name. 619
5. The clause in the second section of the act of 1850, which requires the trustees to sell the remaining property and assets of the Bank "within thirty days from the first Monday in November next", is not mandatory, but directory merely; and therefore, a sale made after the expiration of the time specified is sufficient to pass a good title to the purchaser. 619
6. A plea, averring "that the charter of the Bank was not forfeited, and its corporate existence was not dissolved", is fatally defective on demurrer: the first allegation is no answer to the declaration, which alleges that "the charter was surrendered to the State," and the second is an allegation of matter of law. 619
7. So, a plea, averring that the trustees "were not invested with the legal ownership and control of said note, and did not make a legal transfer and endorsement of the same to the plaintiffs", is but the allegation of a legal conclusion instead of facts, and therefore demurrable. 619
8. The same objection applies to a plea which avers "that said Bank, at the date of said note, had no power or authority to make a contract, and that said note is null and void." 619

BASTARDY, PROCEEDINGS IN.

1. A probate judge has no jurisdiction, except when sitting as a court in term time, to take a confession of judgment from the defendant in a bastardy proceeding; such a judgment, therefore, is *coram non judice*, and void.—Moore v. McGuire, 461

BASTARDY, PROCEEDINGS IN—CONTINUED.

2. But, *it seems*, the court may declare such judgment void, and proceed with the cause from the last previous continuance. 461

BURGLARY.

See CRIMINAL LAW, 63, 64.

CERTIORARI.

1. On a change of venue in a criminal case, the court to which the trial is removed may (Code, § 3615) issue a *certiorari* to the clerk of the court in which the indictment was found, requiring him to transmit certified copies of any and all papers and entries in the cause, and may order the original papers to be returned to him.—Harrall v. The State, 52

CHANCERY.

1. On bill filed to have a deed absolute on its face declared a mortgage, a writing executed by the grantee several months after the original deed, reciting that it was agreed between him and the grantor, at the time the deed was executed, that if the latter re-paid to him by a specified day the amount of the consideration money expressed in the deed, then he would re-convey to him all the property therein mentioned, and binding himself to re-convey accordingly,—is evidence of the highest character against the grantee; and although it may not be sufficient, of itself, to show that the parties intended the deed to operate as a mortgage, yet if the other evidence in the case, taken in connection with it, establishes that to have been the purpose of the parties, or even renders it doubtful whether a mortgage or a conditional sale was intended, it is enough to induce a court of equity to declare it a mortgage.—Locke's Executor v. Palmer, 312
2. The inclination of the courts of equity always has been, to lean against conditional sales, because an error which converts a conditional sale into a mortgage is not as injurious as one which changes a mortgage into a conditional sale; and this inclination is strongly manifested, whenever the transaction had its origin in a proposition for a loan, or the relation of debtor and creditor existed between the parties. 312
3. The fact that the debtor's notes are given up to him by the creditor, and no acknowledgment or other evidence of the debt retained, is a strong circumstance to show that the relation of debtor and creditor was destroyed, but it is not conclusive. 312
4. Therefore, in this case, a deed absolute on its face was declared a mortgage, on proof of these facts: That the transaction originated in a loan of money, and the relation of debtor and creditor existed between the parties; that some of the articles of personal property conveyed were not enumerated in the deed; that the creditor gave up the debtor's notes, and retained no evidence of the debt; that the creditor, about two months afterwards, acknowledged in writing that, at the time the deed was executed, it was agreed between them that, if the debtor re-paid to him by a specified day the amount expressed as the consideration in the deed, then he would re-convey to him all the property therein mentioned, and bound himself to re-convey accordingly; and that all the property, both real and personal, remained in the

CHANCERY—CONTINUED.

debtor's possession, without any agreement for rent or hire so far as the evidence disclosed. 312

5. Equity looks with a jealous eye upon sales of the equity of redemption to the mortgagee, and requires them to be established by the clearest and most convincing proof. (The evidence in this case was held insufficient.) 312

6. If a portion of the mortgaged property has been sold with the mortgagor's consent, and the proceeds applied towards the satisfaction of the debt, he may file a bill to redeem the residue. 312

7. *It seems*, however, that even if there had been no such sale, the mortgagor might, at his option, proceed for a redemption of all or any portion of the property; but if he files a bill to redeem a portion of it only, a decree in his favor would be a bar to any other proceeding of the like nature upon the same contract. 312

8. A simple contract creditor, without a lien, cannot go into equity for the collection of his debt; and therefore, where the purchaser of slaves at sheriff's sale left them in the possession of the defendant in execution, under a written agreement that the latter might be allowed to re-purchase them at a stipulated sum within a specified time; and the defendant borrowed the money and paid it over to the purchaser, who afterwards, without defendant's assent, assigned his bill of sale from the sheriff to the lender,—*held*, that these facts were not sufficient to enable the assignee to assert a claim to the slaves in equity for the reimbursement of the money which he had advanced to the defendant. Turney's Adm'r v. Morrow, 339

9. Where a subsequent creditor takes a mortgage to secure his debt, but does not incur any new responsibility for it, nor waive any right or lien, nor part with anything to obtain it, he is not entitled to relief in chancery against a previous voluntary conveyance of the same property, without averring and proving that such conveyance was made with a fraudulent intent.—Stiles & Co. v. Lightfoot, 443

10. The statutory jurisdiction conferred on the courts of probate, in the allotment of dower, does not take away the jurisdiction of chancery; and if the widow proceeds in equity for lands in which dower cannot be assigned by metes and bounds, she is not compelled to include in her application all the lands in the county in which she is entitled to dower.—Owen v. Slatter, 547

See PLEADING AND PRACTICE IN CHANCERY.

CODE, CONSTRUCTION OF.

1. If the defendant was a mere servant of his employer, having charge of the store-house and goods without any authority to sell, he may be convicted under section 3170 of the Code; but if he was the agent of his employer, and had authority as such agent to furnish goods to customers, he can only be indicted and convicted under section 3143. If, however, he obtained his agency with the felonious intent of stealing the goods, he may be convicted under section 3170.—Case v. The State, 17

2. The term "*public place*," as used in the statute against gaming, (Code, § 3243,) does not include any of the places therein before specifically

CODE, CONSTRUCTION OF—CONTINUED.

mentioned, but embraces all other public places, whether they are public *per se*, or become public merely by force of circumstances; and therefore, if the evidence shows that the defendants played cards at a "*public house*," they cannot be convicted of playing at a "*public place*."—Windham v. The State, 69

3. Section 3408 of the Code, requiring the magistrate to endorse on the warrant of commitment the amount of bail required, applies only to preliminary proceedings before indictment found, and not to commitments after indictment.—Antonez v. The State, 81

4. Section 3130 (respecting the stealing, inveigling, &c., of slaves) construed in Spivey v. The State, 90

5. Sections 3308-9 (as to what is a dwelling-house, within the definition of burglary) construed in *Ex parte* Vincent, 145

6. Sections 2142-3 (as to set-off) construed in Duramus v. Harrison & Whitman, 326

7. In the adoption of the Code, the Legislature is presumed to have known the judicial construction which had been placed on the former statutes; and therefore, the re-enactment in the Code of provisions substantially the same as those contained in the former statutes, is a legislative adoption of their known judicial construction. 326

8. Section 2595 construed in Floyd v. Morrow, 353

9. The distinctions between the actions of detinue and trover are carefully preserved in the Code, and an amendment of the complaint which would convert an action of detinue into an action of trover cannot be allowed.—Code, § 2403.—Harris v. Hillman, 380

10. Husband and wife may join, under the Code (§ 2131) as at common law, to recover upon a promise made to the wife for services rendered by her during coverture.—Jordan's Adm'r v. Hubbard and Wife, 433

11. Section 2490 of the Code applies only to all partial payments, or attempts to avoid the statute of limitations by subsequent undertakings, made since the Code went into effect, but not to verbal promises made previous to that time, 433

12. Section 1 of the Code, which declares that the word "*person*", when used therein, "includes a *corporation* as well as a *natural person*", does not so control the subsequent sections (2516, *et seq.*) giving the process of garnishment against "*any person* indebted to the defendant in attachment," &c., as to authorize a garnishment against a public municipal corporation, to whom those sections, as shown by their provisions, are inapplicable.—Mayor, &c., of Mobile v. Rowland & Co., 498

13. Section 1611 of the Code (which requires two witnesses to a will disposing of either real or personal property) applies to a will of realty executed before the adoption of the Code, if the testator died since its adoption; but a will of personalty only would be governed by the old law.—Hoffman v. Hoffman, 535

14. A complaint in the form prescribed by the Code (p. 551), "on promissory note, by payee against maker", is sufficient to support a judgment by default; and its legal effect is the same as if it contained an averment, in express terms, that the note was payable to the plaintiff. Letondal v. Huguenin, 552

COMMON CARRIERS.

1. A common carrier, as he is not absolved from liability to the owner of the goods by the torts of third persons, has a right to maintain an action for the wrong; and a recovery by him for the injury done to the goods will be a bar to a subsequent action by the owner for the damage or loss resulting from the same injury.—Steamboat Farmer v. McCraw, 189

2. But where the owner of the lost or damaged goods brings his action against the owners of the boat which caused the loss or damage by running into the flat-boat on which the goods were, a plea of a former recovery by the common carrier for the injuries caused by the collision, "which (it avers) are the same injuries in the plaintiff's declaration alleged to have been done to the goods of the said plaintiff," is not equivalent to an averment that the recovery was for the damage done to the goods described in the declaration—*non constat*, that it may not have been for damages done to the goods of some other person which were on board the flat-boat at the same time; such a plea, therefore, is defective on demurrer. 189

3. If the several proprietors of different portions of a public line of travel, by agreement among themselves, appoint a common agent at each end of the route, to receive the fare and give through tickets, this does not, of itself, constitute them partners as to passengers who purchase through tickets, so as to render each one liable for losses occurring on any portion of the line.—Ellsworth v. Tartt, 733

CONGRESS, CONSTRUCTION OF ACTS OF.

1. The thirty-third section of the judiciary act of 1789, (U. S. Statutes at Large, vol. i, p. 91,) which empowers justices of the peace and other officers therein named to arrest and commit (or bail, as the case may require) persons charged with a violation of the criminal law of the United States, is not unconstitutional: the authority thus conferred on justices of the peace is not "judicial power" within the third article of the Federal constitution, nor does the exercise of it make them Federal officers within the second clause of the second section of the second article.—Ex parte Gist, 156

2. The act of Congress of May 8, 1822, (3 U. S. Stat. 699, 700,) "confirming claims to lots in Mobile," &c., confirms only those claims "which, in the opinion of the commissioner, ought to be confirmed"; and the commissioner's report, on which the act is based, only recommends for confirmation, of all the claims embraced in register No. 11, "the claims to such lots as were inhabited and cultivated under the Spanish Government, or such as were built upon by permission of the Spanish authorities." Therefore a claim to a lot, which was inhabited and cultivated by one of the claimant's ancestors while Mobile was under the dominion of Great Britain, though included in the commissioner's report, does not come within the provisions of the act of confirmation, when it is shown that the mansion-house, with all the improvements, was burned down during the siege of Mobile by the Spaniards in 1780, and there is no proof of any subsequent inhabitation or cultivation under Spain.—Kennedy's Executor v. Rochon's Heirs, 384

CONGRESS, CONSTRUCTION OF ACTS OF—CONTINUED.

(This applies to the claims of the heirs of A. Rochon, numbered 74, 75 and 76, in the register (No. 11) of claims "founded on private conveyances, which have passed through the office of the commandant, but which are founded, as the claimant supposes, on grants lost by time or accident."—See Commissioner Crawford's Report, in 3d vol. Amer. State Papers, p. 32.)

3. The case of Doe *ex dem.* Farmer's Heirs v. Eslava, reported in 9th Howard's U. S. Rep. 421, in which a similar claim was held to be within the act of confirmation, cannot be regarded as a judicial determination of the point presented in this case, since no question was there raised as to the fact of confirmation. 384

CONSTITUTION.

1. The constitutional guaranty of a trial by jury "in all prosecutions by indictment or information." (Art. I, § 10.) does not apply to offences created by statute since the adoption of the constitution, except in the specified cases; but it is within the power of the Legislature to make such offences triable before a justice of the peace without indictment.—Tims v. The State, 165
2. Nor does the provision contained in the twenty-eighth section of the same article, which declares that "the trial by jury shall remain inviolate," extend the right of a jury trial to cases which were unknown, at the time of the adoption of the constitution, either to the common or to the statute law. 165
3. The third section of the act of February 7, 1854, (Pamphlet Acts 1853-4, p. 247,) which makes defaulting overseers of roads triable before a justice of the peace, is not violative of the right to a trial by jury, as secured by the tenth and twenty-eighth sections of the first article of the constitution; but it is unconstitutional (Art. V, § 10,) in that it makes no provision for an appeal, and the general law regulating appeals (Code, § 2811) is inapplicable to the case. 165
4. A repealing clause in an unconstitutional statute, declaring "that all laws contravening the provisions of this act be, and the same are hereby, repealed," does not affect the previous laws. 165
5. The power to remit fines and forfeitures is confided by the State constitution to the Governor alone, and cannot be exercised by the Legislature; and therefore any act of the Legislature which attempts, directly or indirectly, to remit a fine, either before or after it has been paid, is unconstitutional.—Haley v. Clark, 439
6. Therefore the act of February 2, 1850, (Pamph. Acts 1849-50, p. 452,) entitled "An act for the relief of the securities of John Douglass, late clerk of the Circuit Court of Marion county", is unconstitutional. 439

CONTRACTS.

1. A promise by defendant, upon valuable consideration, to give his daughter, who was plaintiff's wife, "a full share of his property, which then and there was worth $25,000", is too indefinite and uncertain to support an action under the Code.—Adams and Wife v. Adams, 272
2. *It seems*, however, that a promise by a father, upon valuable consid-

CONTRACTS—CONTINUED:

eration, to make his daughter equal in property to his other children, (or to give her so much as would make her share equal to a given portion of his estate; as, one-fourth, one-fifth, &c.,) is sufficient to support an action, if the parties contemplated its present execution upon the performance of the consideration. 272

3. Such a contract, although its execution may be postponed by circumstances beyond a year and a day, and although the defendant's estate consists entirely of lands, is not within the statute of frauds. 272

4. When a contract admits of two constructions, one of which will destroy, and the other uphold it, the latter construction must prevail. 272

5. When no time is specified for the performance of a contract, the law requires that it shall be performed within a reasonable time. 272

6. *Held*, on the authority of Prater v. Miller, 25 Ala. 320, that a verbal promise to pay, or to part with anything valuable, in settlement of a controversy not existing in the form of a pending suit, cannot be enforced in a court of law, without some proof that there was a reasonable ground for such controversy; and that, therefore, in a suit on a note given for the price of a slave, it was not error to refuse to instruct the jury, at the defendant's request, "that if they believed there was a controversy between plaintiff and defendant as to whether plaintiff had defrauded defendant in the sale of the negro, and that plaintiff, in settlement of the controversy, agreed to knock off one hundred dollars on the note, then defendant would be entitled to a deduction for that sum."—Stewart v. Bradford, 410

7. One who contracts with a workman for services within his art or calling, has a right to rely upon his representations as to his skill; and although the law will not seek to compel a man to perform that which is impossible, yet it will not allow the workman, after he has obtained money as the price of stipulated services which he cannot perform, by false and fraudulent representations as to his skill in his business, to defeat a recovery for the deceit and consequent injury by setting up the impracticability of those services.—McGar v. Williams, 469

8. Therefore, in an action for deceit against a tinner, who followed the business of putting tin roofs on houses, for that he falsely and fraudulently represented that he would put a tin roof on plaintiff's house which would not leak for twenty years, whereas the said roof did leak before the expiration of two years,—the true question to be submitted to the jury is, not the practicability of putting on a tin roof which would last twenty years without leaking, but whether the representations (if made) were false, and whether plaintiff was thereby deceived to his injury. 469

9. If defendant's representations related to putting a roof on a building to be erected upon an agreed plan, and plaintiff afterwards, without defendant's consent, caused a material change to be made in the building, thereby rendering it necessary to make a material change in the form of the roof, he must be considered as having abandoned the original contract, and cannot hold defendant bound by his representations as to the original plan; but if defendant's representations as to the character of the roof had no reference to any parti-

CONTRACTS—CONTINUED.

cular plan, and he proceeded to put the roof on the building under his contract, without making any objection to the alteration of the plan, the change would not affect his liability. 469

10. A partial payment made by plaintiff after discovering that the roof leaked, without objecting to it on that ground, is a circumstance to be weighed by the jury in determining whether any fraud was practiced by the defendant, but it cannot operate as an estoppel *in pais*, nor as a release or waiver of an existing cause of action. 469

11. If the holder of a note, having bound himself by written contract to account for it to the owner, recovers judgment on it in his own name, and by private agreement with the sheriff, after a sale under execution, takes the property at the purchaser's bid, he thereby becomes liable to the owner of the note for the amount in money, and cannot raise objections to the sale of which the defendant in execution might avail himself; and if the amount was lessened by expenses, court costs, &c., the *onus* of proving it devolves on him.—Hudson v. Crow, 515

12. Nor is he entitled to a deduction for expenses incurred by him in pursuing the defendant in execution, who had secretly left the county, taking his property with him, when such expenses are not shown to have been necessarily incurred, nor to have been such as the bailor would be bound to pay. 515

13. Defendant, being indebted to plaintiff by open account for goods sold and delivered, gave him a note for a larger amount on a third person, and agreed to take up the difference in goods at cash value as he might want them, and received part of the goods the next day; but plaintiff, discovering a few days afterwards that the maker of the note was insolvent, thereupon tendered back the note, and demanded a rescission of the contract, and then brought suit on the account for goods sold, &c.; to which defendant pleaded payment and set-off: *Held*, that if plaintiff received the note in payment of the account, without any fraud or misrepresentation on the part of the defendant to induce him to take it, then the delivery of the note operated a payment and extinguishment of the account, and plaintiff became bound to defendant for goods at cash value to the amount of the difference between the note and the account; but that this liability for goods, coupled with the disaffirmance of the contract on the part of plaintiff, could not be used as a set-off in this suit, so as to entitle defendant to judgment for the difference between the note and the account.—Carriere v. Ticknor, 571

14. A liability to pay hire for slaves, upon an implied promise, will only be raised against the person who had their possession and services. Smith v. Pearson, 603

15. Where the purchaser of slaves, on discovering their unsoundness, wrote to the vendor, informing him of that fact, and tendering them back; and the vendor, in reply, objected that the offer to rescind was made too late, and referred the purchaser to his warranty for indemnity: *Held*, that these letters did not amount to a rescission of the contract, when it was shown that the purchaser had afterwards brought suit on the warranty.—Bennett v. Fail & Patterson, 605

CONTRACTS—CONTINUED.

16. If the vendor refuses to accept the property when the purchaser offers to return it, this will dispense with a more formal tender; but the purchaser, if he still retains the property in his possession, must yield it up on the reasonable demand of the vendor, and his refusal to surrender on such demand, even after suit brought, will destroy the effect of his previous tender. 605

17. Under a written contract between an overseer and his employer, whereby the latter agrees to give the former for his services "three-sixteenths of all the cotton raised on the place, and to gin and haul his cotton, with his own, free of charge," the overseer is entitled also to three-sixteenths of the cotton-seed, and is a co-owner with his employer both in the cotton and the seed, until a division is made between them; but a delivery of the cotton, after ginning, would not operate as a delivery of the seed.—Allen v. Harper, 686

18. Plaintiff having agreed with S. & P., who were mail contractors, to keep their drivers and horses at a stipulated sum per annum, payable quarterly, and during the last quarter, on their becoming insolvent, having refused to keep their drivers and horses without security, thereupon defendant, at the request of S. & P., wrote to plaintiff, saying "I will see you paid for this quarter, as their time then expires, payable when due in Alabama bank-notes"; plaintiff kept the drivers and horses until the expiration of the quarter, and the agent of S. & P. afterwards closed their account by giving the note of the surviving partner, payable one day after date, which was filed as a claim against the estate of the deceased partner: *Held*, that defendant's promise was an original undertaking, upon a new and sufficient consideration, which, upon its acceptance by plaintiff, discharged the debt of S. & P., and bound defendant to pay, at the expiration of the quarter, in Alabama bank-notes.—Jolley v. Walker's Adm'rs, 690

19. When a contract under seal is materially varied by a subsequent valid contract, which is also under seal, a recovery cannot be had on a declaration which only sets out the first contract and its breach; and if the declaration sets up both contracts, alleging an appropriate breach, a plea of performance of the obligations imposed by the original agreement, which is silent as to the additional obligations created by the second agreement, is defective on demurrer.—Nesbitt v. McGehee, 748

20. A contract under seal contained these provisions: "The said M. covenants and agrees to deliver to the said N., at the water's edge, at his steam-mills at Cedar Bluff, all the stocks for string timber for the Memphis Branch Railroad, agreeably to the said N.'s contract, made January 18th, with the engineer of said road"; the stocks to be of a specified size and quality, and "the timber to be delivered as fast as required for sawing, say one hundred stocks per week, more or less, as may be necessary. * * * And the said N., on his part, covenants and agrees to pay the said M., when the above contract shall have been faithfully complied with, at the following rates, to-wit, forty-five cents per stock; and that he will make his payments in the following manner—that is to say, on the twentieth day of every month during the

CONTRACTS—CONTINUED.

progress of this contract, he will pay seventy-five per cent. of the relative value of such timber as may be delivered, until the whole of the timber herein contracted for shall have been delivered agreeably to contract, when the balance shall be forthwith paid to the said M.": *Held*, that the weekly delivery by M., at the specified place, from the date of the agreement until the next twentieth day of the month, of such a number of logs (not exceeding one hundred per week) of the specified size and quality, as was necessary to afford constant employment to N.'s steam-mills in sawing them during the usual working hours of each day of the week, was the first thing to be done under the contract—a condition precedent to N.'s liability to pay; and that M.'s failure to perform that act, was a breach of his covenant, and instantly vested a right of action in N. 748

21. If the parties to a pending suit, under the mistaken impression that the costs have been adjudged against the defendant, enter into a verbal contract, by which plaintiff agrees to pay the costs in the first instance, and defendant promises to re-pay them; and also the note on which the suit is founded, and which he admits to be just, in good accounts due the first day of January next thereafter, the promise is binding, and its validity is not affected by the mistake.—Eastman v. Hobbs, 741

22. And if the plaintiff, on the verbal agreement being afterwards reduced to writing, fails to inform the defendant of the mistake, and conceals from him the fact (which he had himself discovered, and of which he knew defendant was still ignorant) that he had taken a nonsuit, this does not amount to a fraud on the defendant, nor enable him to avoid the written contract. 741

COSTS.

1. Where a decree in chancery, dismissing a bill as to both of the defendants, was reversed on error, and the complainants held to be entitled to relief against one of the defendants, the costs of the appellate court were apportioned; one half being taxed against the complainants, and the other half against the unsuccessful defendant.—Tyus v. DeJarnette, 280

2. The statute which provides that, "in all actions to recover damages for torts, the plaintiff shall recover no more costs than damages where the damages do not exceed five dollars, unless the presiding judge shall certify that greater damages should in justice have been awarded," (Clay's Digest, p. 316, § 25,) does not apply to an action of debt on an attachment bond to recover damages for the wrongful and vexatious suing out of the attachment.—McAllister v. McDow, 453

COURT AND JURY.

1. It is the duty of the court to declare the legal effect of a record which is offered to sustain the plea of *autrefois acquit* or discontinuance, and the record itself cannot be gainsayed by parol proof; therefore, the court may charge the jury, that the pleas are not sustained by the proof, when that is the case.—Martha v. The State, 72

2. A charge is erroneous, which instructs the jury "that, if they found there was a conflict between the special charges given by the court.

COURT AND JURY—CONTINUED.

at the defendant's request, and the main charge, then the latter must prevail."—Spivey v. The State, 90

3. In criminal prosecutions, neither party can be permitted, except by mutual consent, to withdraw the trial from the jury to the court by a demurrer to the evidence.—Brister et al. v. The State, 107

4. Distinction stated between the sphere of the judge in deciding upon the competency of confessions, and that of the jury in determining their credibility and effect. 107

5. The improper conduct of the jury, after they have retired to make up a verdict, is not a ground for a motion in arrest of judgment. 107

6. Misconduct of the jury is a ground for a motion for a new trial, but the action of the court in refusing a new trial on that ground is not revisable on error. 107

7. If the verdict of the jury is received, and read aloud in open court, in the absence of the prisoners, and the jury are then told by the judge that they are discharged, it is within the power of the court to call them back before they have left the bar; and if they are immediately recalled, upon the discovery being made that the prisoners are not in court, and the papers in the cause are handed back to them, the prisoners are not deprived of their right to poll the jury, nor can they complain on error of this action of the court. 107

8. The constitutional guaranty of a trial by jury, "in all criminal prosecutions," includes the right to have the deliberations of the jury continued, when once they have begun the trial and heard any evidence, until the occurrence of a sufficient legal reason for their discharge, and the chance of a verdict of acquittal at their hands during all that time; and therefore the unauthorized discharge of a jury in any criminal case, either for a misdemeanor or a felony, is equivalent to an acquittal. (CHILTON, C. J., expressing no opinion.) McCauley v. The State, 135

9. But, since the court has power to discharge the jury in cases of necessity, or when the prisoner consents to it, a plea of a previous withdrawal of the cause from the jury after issue joined, "without the consent of defendant, and against his objection," is defective on demurrer: it should also negative the existence of any necessity for such withdrawal. 135

10. The constitutional guaranty of a trial by jury "in all prosecutions by indictment or information," (Art. I, § 10,) does not apply to offences created by statute since the adoption of the constitution, except in the specified cases; but it is within the power of the Legislature to make such offences triable before a justice of the peace without indictment.—Tims v. The State, 165

11. Nor does the provision contained in the twenty-eighth section of the same article, which declares that "the trial by jury shall remain inviolate," extend the right of a jury trial to cases which were unknown, at the time of the adoption of the constitution, either to the common or to the statute law. 165

12. On the request of the jury for further instructions, the presiding judge said, "I perceive from your questions that your minds have been misled by a case read by defendant's counsel," and then stated

COURT AND JURY—CONTINUED.

to them, "that they should receive the law only from the court,—that counsel often read books to the jury to explain themselves more clearly and forcibly, but that they must not receive them as law, except so far as sanctioned by the court:" *Held*, that there was no error in these instructions.—Chamberlain & Co. v. Masterson, 371

13. It is error to instruct the jury, "that the main charge was to be with them the controlling part of the charge." 371

14. The construction of an order of sale, made by the orphans' court, is a question for the court, and not for the jury, and must be determined from an inspection of the record alone, without the aid of evidence *aliunde* to show its meaning.—Wyatt's Adm'r v. Steele, 639

15. If the court, after deciding a question of law against the plaintiff, refuses to instruct the jury, on his request, that they have nothing to do with the decision of that question—thereby impliedly admitting their right to revise its decision—the refusal of the charge gives the plaintiff an additional chance for a verdict, and is, therefore, no cause of reversal in his favor. 639

16. A purely abstract charge which could not have misled the jury, furnishes no ground of reversal.—Rolston v. Langdon, 660

17. When a charge asked needs to be qualified or explained, to prevent it from misleading the jury, it may be refused. 660

18. When a charge is asked which admits of two constructions, one of which is calculated to confuse the jury, it may be refused. 660

19. An abstract charge, which asserts a correct legal proposition, is no ground for reversal, when the record shows that it could not have misled the jury.—Taylor v. Morrison, 728

COURT, COMMISSIONERS'.

1. The proceedings of the commissioners' court, in the establishment of a public road, cannot be sustained, when assailed on *certiorari*, unless the record shows that the court had jurisdiction, and that its jurisdiction was exercised in the mode prescribed by the statute.—Keenan v. Commissioners' Court of Dallas County, 568

2. The form of oath prescribed for the viewers of the road (Code, § 1134) must be fully set out, and precisely pursued: a recital, in their return, that they were "duly sworn before acting," is insufficient. 568

3. The record must show that the road described in the order of the court was viewed and marked out by the jury, "to the greatest advantage to the public, and with as little prejudice to individuals as possible, and without partiality or favor:" where the order of the court directs the jury "to view and mark out the best route for the said road," and they report that, "being duly sworn before acting," they "performed the duty assigned them in the order to the best of their ability, without partiality or favor," this is not a sufficient compliance with the requisitions of the statute. 568

COURT, ORPHANS' AND PROBATE.

See PROBATE, COURT OF.

COURT, SUPREME.

See APPEALS,

ERROR.

CRIMINAL LAW.

1. Under an indictment for larceny from a store-house, (Code, § § 3170, 3175,) if the jury assess the aggregate (instead of the separate) value of the stolen articles, the irregularity is not available to the defendant, either on motion in arrest of judgment, or on error.—Case v. The State, 17

2. If the defendant was a mere servant of his employer, having charge of the store-house and goods without any authority to sell, he may be convicted under section 3170 of the Code; but if he was the agent of his employer, and had authority as such agent to furnish goods to customers, he can only be indicted and convicted under section 3143. If, however, he obtained his agency with the felonious intent of stealing the goods, he may be convicted under section 3170. 17

3. Whether a person is "a man of known intemperate habits," is a question of fact to which a witness may depose.—Stanley & Elliott v. The State, 26

4. Under an indictment for retailing without a license, (Code, § 1059,) evidence that the intemperate habits of the person to whom the liquor was sold were generally known in the community, is irrelevant and inadmissible: the fact that his intemperate habits were generally known in the community, does not justify the inference that they were known to the defendant. 26

5. To excuse a homicide, there must exist on the part of the slayer an actual necessity to kill in order to prevent the commission of a felony or great bodily harm, or a reasonable belief in his mind that such necessity exists.—Noles v. The State, 31

6. While every citizen has the right to resist any attempt to put an illegal restraint upon his liberty, his resistance must not be in enormous disproportion to the injury threatened. He has no right to kill to prevent a mere trespass which is unaccompanied by any imminent danger of great bodily harm or felony, and which does not produce in his mind a reasonable belief of such danger. 31

7. The charges of the court in this case, and its refusal to give the charges asked by the prisoner, tested by those principles, and held correct. 31

8. Any fact which tends to prove the real motive of the prisoner in killing the deceased, or the purpose of the deceased in going to the prisoner's house, or that the prisoner knew, at the time of the killing, that the deceased and his companions did not intend to commit any felony, nor to do him any great bodily harm, is relevant evidence. 31

9. A verdict, finding the prisoner "guilty of murder in the first degree, and penitentiary for life," is sufficient to support a judgment of conviction and sentence of confinement in the penitentiary for life. 31

10. Where three are jointly indicted for an assault with intent to murder, but are tried separately, a letter written by one of them to the prosecutor some time before the commission of the assault, showing malice and ill-will on the part of the writer towards the prosecutor, is not admissible evidence against another who, though *particeps*

CRIMINAL LAW—CONTINUED.

criminis in the assault, is not shown to have had any connection whatever with the writing of the letter, nor to have acted in concert with the writer, nor to have participated in his ill-will towards the prosecutor.—Stewart v. The State, 44

11. But, *it seems*, if the defendants had entered into a conspiracy to kill the prosecutor, and the letter was subsequently written by one of them to bring on the difficulty, or in furtherance of their common design, it would be admissible evidence against all of them; the act of each, in furtherance of the common design, being deemed in law the act of all. 44

12. Under an indictment for retailing without a license in the general form allowed by the Code, (§ 1059,) the defendant cannot require the prosecuting attorney to state and elect, before any evidence is offered, for which one of the different varieties of retailing he intends to proceed.—Elam v. The State, 48

13. But after the State has once made its election by offering evidence of one particular offence, it will be held to that election through all the future proceedings, and on a second trial under the same indictment will not be allowed to offer evidence of a different offence. 48

14. If the order for a change of venue, in a criminal case, directs the clerk to transmit "the original papers in the cause," it is nevertheless his duty (Code, § 3613) to transmit a transcript; and such order, even if erroneous, is no ground for a reversal of the judgment and sentence of conviction.—Harrall v. The State, 52

15. The failure of the clerk, after a change of venue has been ordered, to transmit a transcript to the clerk of the court to which the trial is removed, and the failure to have the cause entered on the docket of that court at the term next after the order of removal, is no discontinuance of the prosecution. 52

16. The court to which the trial is removed may (Code, § 3615) issue a *certiorari* to the clerk of the court in which the indictment was found, requiring him to transmit certified copies of any and all papers and entries in the cause, and may order the original papers to be returned to him. 52

17. It is not necessary that an indictment, under the forms prescribed by the Code, should be signed by the solicitor. 52

18. The certified copy of the indictment may be read to the jury on the trial; and therefore, if the entire transcript, containing a copy of the indictment, is offered to the jury, and the defendant objects to it as a whole, his objection may be overruled. 52

19. A verdict finding the defendant "guilty of murder in the first degree, and penitentiary for life," is sufficient to support a judgment of conviction and sentence of confinemet in the penitentiary for life. 52

20. If a part of a conversation is adduced in evidence by the State, as proving the defendant's declarations or confessions of guilt, he has the right to call for the whole of what was said in that conversation relative to the subject-matter in issue.—Chambers v. The State, 59

21. Under an indictment against a negro trader for exhibiting slaves for sale without a license, (Pamph. Acts 1849-50, p. 8,) after evidence

CRIMINAL LAW—CONTINUED.

has been offered of a particular act of sale within the time covered by the indictment, evidence of a previous act more than twelve months before the finding of the indictment, is admissible for the State, as tending to show that the defendant was engaged in the business of negro-trading. 59

22. If the defendant was engaged in the business of negro-trading, proof of one act, in pursuance of such business, within the county in which the indictment was found, is sufficient to support a conviction. 59

23. Under an indictment for gaming, (Code, §3243,) upon demurrer to the evidence, the defendant may be convicted on proof of his having played a game of "ramps" in a store-house where spirituous liquors were at the time retailed.—Bryan v. The State, 65

24. The term "*public place*," as used in the statute against gaming, (Code, § 3243,) does not include any of the places therein before specifically mentioned, but embraces all other public places, whether they are public *per se*, or become public merely by force of circumstances; and therefore, if the evidence shows that the defendants played cards at a "*public house*," they cannot be convicted of playing at a "*public place*."—Windham v. The State, 69

25. A room in a warehouse for storing cotton on the bank of a navigable river, which is used by the clerk both for the transaction of business and as a sleeping room, is a "*public house*" within the statute against gaming, but not a "*public place*." 69

26. The same distinction is applicable to the cases of Burdine v. The State (25 Ala. 60), Sherrod v. The State (*ib.* 58), Roquemore v. The State (19 *ib.* 528), and Clarke *v.* The State (12 *ib.* 492). 69

27. When the gaming is at a "public house," or at any one of the other places specifically enumerated in the statute, no matter what secrecy may be used, nor how few the number present, it is a violation of the statute. 69

28. In an indictment for arson, under the Code, as at common law, the ownership of the house burned must be alleged, and must be proved as laid.—Martha v. The State, 72

29. If the proof of the ownership varies from the allegation, and a *nolle pros.* is thereupon entered, this is no bar to a subsequent prosecution under a second indictment, in which the ownership is alleged to be in a different person; and if the second indictment contains several counts, in one of which the allegation of ownership is the same as in the first indictment, and the defendant pleads to the whole indictment *autrefois acquit* and discontinuance, the record of the former prosecution does not sustain either plea. 72

30. It is the duty of the court to declare the legal effect of a record which is offered to sustain the plea of *autrefois acquit* or discontinuance, and the record itself cannot be gainsayed by parol evidence; therefore, the court may charge the jury that the pleas are not sustained by the proof, when that is the fact. 72

31. Under an indictment for betting "at a game of pool at a public place enumerated in section 3243 of the Code," the defendant may be convicted on proof that he played pool at a table regularly licensed for

CRIMINAL LAW—CONTINUED.

billiards, as a license to keep a billiard table does not authorize its use for the game of pool.—Rodgers v. The State, 76

32. An indictment for betting "at a game of pool at a house where spirituous liquors were retailed," or (as alleged in a second count) "at a public place enumerated in section 3249 of the Code," conforms substantially to the requisitions of the Code, and is therefore sufficient. 76

33. An indictment which, upon its face, charges several defendants for several offences committed by them independently of each other, (some of which were committed by some of the defendants at one time, and some by others of the defendants at a different time,) is fatally defective.—Elliott v. The State, 78

34. If an indictment is unobjectionable on its face, no conviction under it can be had on proof of facts which, if stated in the indictment, would make it fatally defective, and enable the defendants, after conviction, to arrest or reverse the judgment. 78

35. Therefore, if A and B are jointly indicted and tried for gaming, and the evidence shows that A and others played at one time when B was not present, and that B and others played at another time when A was not present, no conviction can be had against them. 78

36. A sheriff has no power under the Code to admit to bail a person charged with a felony after indictment found, nor can that power be delegated to him by an order of the Circuit Court in these words: "And it appearing to the court that the offence with which the prisoner stands charged, namely, murder in the second degree, is bailable, it is ordered that, upon the prisoner giving good and sufficient bail, according to law, for his appearance at the next term of this court, in the sum of $1,000, then said prisoner be discharged from custody until the next term of this court."—Antonez v. The State, 81

37. Section 3408 of the Code, requiring the magistrate to endorse on the warrant of commitment the amount of bail required, applies only to preliminary proceedings before indictment found, and not to commitments after indictment. 81

38. Under an indictment for failing and neglecting to keep in repair a certain turnpike road, which defendant and another were authorized by private act of the Legislature to construct, the court cannot take judicial notice of the charter if it is not set out, but must look only to the allegations of the indictment; and if it alleges that the defendant alone accepted the charter, and erected toll gates and took toll by its authority, but does not allege that the charter authorized him to accept alone, or required him to keep the road in repair, it is fatally defective on demurrer.—Code, § 3501.—Moore v. The State, 88

39. The statute of this State respecting the stealing, inveigling, &c., of slaves (Code, § 3130) was intended to afford ampler protection and security to slave property than was afforded by the rules of the common law, and makes several radical changes in the common law. Spivey v. The State, 90

40. When one man has carried away the slave of another, the question whether or not he is guilty of a felony (under section 3130 of the Code) depends on the intent with which the act was done: whenever there is not clear and satisfactory proof of the felonious intent de-

CRIMINAL LAW—CONTINUED.

nounced by the statute, concurring with the act of carrying away, there is no ground for a conviction. 90

41. At common law, a taking was necessary to constitute larceny; but not so, as to all the offences created by this statute. 90

42. At common law, a bailee, who had acquired possession of goods without any intent at the time to steal them, could not, during the continuance of the bailment, commit larceny as to such goods, unless he broke the bulk or package; but this statute makes no such exception; it includes "any person" who commits either one of the acts denounced by it with the felonious intent indicated by its terms; it embraces the carrying away, &c., of "any slave," whether in the actual possession of the owner, or of a bailee, or in the merely constructive possession of the owner. 90

43. Conversion, and carrying away, are neither synonyms, nor convertible terms; a felonious carrying away of a slave necessarily includes a conversion, but a conversion does not necessarily include a carrying away; and a mere conversion, even with a criminal intent, is no felony, unless there is also a carrying away. 90

44. The defendant's declarations, made while he was in possession of the slave, "as to the manner in which he bought him," are not admissible evidence for him under an indictment for stealing the slave.—Code, § 3130. 90

45. But any evidence tending to prove that the defendant honestly believed that he had the right to carry away and sell the slave, is admissible for him; and therefore, where defendant had possession of the slave under a bailment from the former owner, (since deceased,) the declarations of the bailor, tending to show a sale to defendant, are competent evidence, although referring to a paper which is not produced and whose absence is not accounted for. 90

46. On the trial of an indictment for arson, after the State has proved the burning of the house as charged, and offered evidence tending to show that the defendant was the person who set fire to it, evidence showing that another house belonging to the prosecutor was subsequently burned, is irrelevant and inadmissible; nor is it made relevant by being offered in connection with proof of defendant's declaration, made after the first but before the second burning, that he was not yet done with the prosecutor, especially when the declaration is shown to have been made in a conversation, in which "no reference was made to either of the burnings, but the parties were speaking of a civil case which defendant had before the prosecutor as a justice of the peace, and in which defendant complained the prosecutor had treated him rascally."—Brook v. The State, 104

47. Every person indicted for a capital offence, if he is in actual confinement, is entitled to have a copy of the indictment delivered to him at least two entire days before the day appointed for his trial (Code, § 3576); delivery to his counsel is not sufficient.—Brister et al. v. The State, 107

48. But if the defendant objects to going to trial, "on the ground that a copy of the indictment has not been served on him *or his counsel* two entire days before the trial", and it is shown that a copy was

CRIMINAL LAW—CONTINUED.

delivered *to his counsel* two entire days before the trial, there is no error in overruling the objection, as the form in which it is made is a waiver of the right to personal service if a copy has been delivered to counsel. 107

49. When the venue is changed on the defendant's application (Code, § 3615), the certified copy of the indictment becomes so far an original, in the court to which the trial is removed, that a copy of *it*, when delivered to the prisoner, will be a sufficient compliance with the statute, and have the same effect that a copy of the actual original could have. 107

50. If the transcript furnished by the clerk, on change of venue, is duly certified by him to contain a copy of the caption of the grand jury, the indictment, with all the endorsements thereon, and all the entries and orders made in relation to the cause, including the order for the removal of the trial, as required by the Code (§ 3613), the defendants may be tried on such transcript. 107

51. Where there is a joint trial under a joint indictment, each defendant may challenge the whole number of jurors to which he would be entitled if tried separately. 107

52. In criminal prosecutions, neither party can be permitted, except by mutual consent, to withdraw the trial from the jury to the court by a demurrer to the evidence. 107

53. A witness who is introduced by the State to prove the defendants' confessions, and who states, on re-examination, "that he had testified to the substance of all that each of said defendants stated on that occasion, but that they may have stated something which he did not recollect", is competent to testify to the confessions, if in themselves admissible. 107

54. The general rules stated, which should govern the court in deciding upon the competency of confessions, and the jury in determining their credibility and effect after they have been admitted by the court. Distinction also stated between the sphere of the judge and the sphere of the jury. 106

55. As to the construction of the bill of exceptions, which showed two separate objections by the defendants to the admission of their confessions: It was *held* by a majority of the court, that the last of these objections was so made as to present the question, whether upon the evidence previously set out in the bill of exceptions the confessions were admissible, and that the court below erred in overruling this objection and admitting the confessions; while RICE, J., *dissenting*, held that there was no error shown by the record in overruling either of said objections. 107

56. Charge of the court on the subject of confessions, and its refusal to charge as requested, held correct. 107

57. When several defendants are jointly indicted and tried, if there is any evidence against one, the court may overrule the motions of his co-defendants "to introduce him as a witness, on the ground that there was no evidence against him to authorize him to be put on his defence", and "to direct and allow the jury to return a verdict of acquittal as to him, on the ground that there was no sufficient evi-

CRIMINAL LAW—CONTINUED.

dence of his guilt to require him further to defend."—Code, § 3594. 107

58. If the indictment charges that A gave the mortal blow, and that B and C were present aiding and abetting, while the evidence shows that B struck the blow, and that A and C were present aiding and abetting, this is not a material variance, for the blow is adjudged in law to be the stroke of every one of them. 107

59. If the verdict of the jury is received, and read aloud in open court, in the absence of the prisoners, and the jury are then told by the court that they are discharged, it is within the power of the court to call them back before they have left the bar; and if they are immediately recalled, upon the discovery being made that the prisoners are not in court, and the papers in the cause are handed back to them, the prisoners are not deprived of their right to poll the jury, nor can they complain on error of this action of the court. 107

60. A lawyer's office, though a "public house" within the statute against gaming, (Code, § 3243,) is not a "public place."—McCauley v. The State, 135

61. The constitutional guaranty of a trial by jury, "in all criminal prosecutions," includes the right to have the deliberations of the jury continued, when once they have begun the trial and heard any evidence, until the occurrence of a sufficient legal reason for their discharge, and the chance of a verdict of acquittal at their hands during all that time; and therefore the unauthorized discharge of a jury in any criminal case, either for a misdemeanor or a felony, is equivalent to an acquittal. (CHILTON, C. J., expressing no opinion.) 135

62. But, since the court has power to discharge the jury in cases of necessity, or when the prisoner consents to it, a plea of a previous withdrawal of the cause from the jury after issue joined, "without the consent of defendant, and against his objection", is defective on demurrer: it should also negative the existence of any necessity for such withdrawal. 135

63. A two-storied house of which the front room on the first floor was used as a store-house, and the back room (which also contained a few boxes of goods, and communicated with the front by a door in the partition) as a sleeping room by the owner, while his clerks, who were unmarried men and took their meals at a hotel, slept in the rooms on the second floor,—*held* a dwelling-house, both within the common-law definition of burglary, and under sections 3308-9 of the Code.—Ex parte Vincent, 145

64. The term "dwelling-house," as used in section 3308 of the Code, has the same meaning as in the definition of burglary at common law; and the following section (3309) was intended to soften the rigor of the old statute (Clay's Digest, p. 472, § 4), by narrowing the meaning of the term, in requiring that there should be a white person in the house at the time the offence was committed, and that the building should be joined to and parcel of the dwelling-house. 145

65. Under an indictment for resisting process, if the time of the commission of the offence is shown by the indictment itself to have been after the return day of the process, it is fatally defective on error.—McGehee v. The State, 154

CRIMINAL LAW—CONTINUED.

66. Under an indictment for gaming, the defendant may be convicted on proof "that he and another each put up money and threw dice for it, by placing the dice in a box and throwing three times each, the one throwing the highest number taking the money"; although it is also shown "that the mode of procedure and of throwing the dice was the same as in the case of raffling for property."—Jones v. The State, 155

67. The thirty-third section of the judiciary act of 1789, (U. S. Statutes at Large, vol. i, p. 91,) which empowers justices of the peace and other officers therein named to arrest and commit (or bail, as the case may require) persons charged with a violation of the criminal law of the United States, is not unconstitutional: the authority thus conferred on justices of the peace is not "judicial power" within the third article of the Federal constitution, nor does the exercise of it make them Federal officers within the second clause of the second section of the second article.—Ex parte Gist, 156

68. The constitutional guaranty of a trial by jury "in all prosecutions by indictment or information," (Art. I, § 10,) does not apply to offences created by statute since the adoption of the constitution, except in the specified cases; but it is within the power of the Legislature to make such offences triable before a justice of the peace without indictment.—Tims v. The State, 165

69. Nor does the provision contained in the twenty-eighth section of the same article, which declares that "the trial by jury shall remain inviolate," extend the right of a jury trial to cases which were unknown, at the time of the adoption of the constitution, either to the common or to the statute law. 165

70. The third section of the act of February 7, 1854, (Pamphlet Acts 1853-4, p. 247,) which makes defaulting overseers of roads triable before a justice of the peace, is not violative of the right to a trial by jury, as secured by the tenth and twenty-eighth sections of the first article of the constitution; but it is unconstitutional (Art. V, § 10,) in that it makes no provision for an appeal, and the general law regulating appeals (Code, § 2811) is inapplicable to the case. 165

DAMAGES.

1. The general rule of the common law is, that if both vessels are to blame, neither can recover damages for injuries caused by the collision; but this rule applies only to faults which operated directly and immediately to produce the collision.—Steamboat Farmer v. McCraw, 189

2. There is no inflexible rule, either of the river or of the road, the neglect of which by one party will dispense with the exercise of common caution by the other. 189

3. "Ordinary care" is altogether a relative term; and in such cases as this, the want of it means nothing more than the failure to use those precautions which a just regard to the persons and property of others demands should be used under the circumstances of each particular case. 189

4. In trover, when the thing converted has a fixed value, the true measure of damages is that value at the time of conversion, and the jury may give interest upon it; and if the value is fluctuating, the jury may

DAMAGES—CONTINUED.
take its highest value at any time between the conversion and the trial.—Jenkins v. McConico, 213
5. In detinue for a slave, if the damages are not proved, a nominal sum only should be given; and it is therefore error to instruct the jury, that, in the absence of proof as to the value of the slave's hire, they might give interest on the agreed value of the slave by way of damages.—Miller v. Jones' Adm'r, 247
6. On an exchange of slaves between plaintiff and defendant, the parties reciprocally executed bills of sale, under seal, containing warranties of soundness; and plaintiff afterwards brought covenant to recover damages for the defendant's breach of warranty: *Held*, that the defendant might recoup the damages which he had sustained by plaintiff's breach of warranty.—Eckles & Brown v. Carter, 563
7. Neither case nor assumpsit can be maintained to recover damages for the breach of defendant's duty and contract in not permitting plaintiff to cut and carry away timber, when the declaration shows that the injury complained of resulted from plaintiff's being enjoined and restrained by proceedings in chancery instituted by defendant: the only remedy is, an action on the injunction bond, if there is a breach of it, or an action on the case averring malice.—McLaren, Ragan & Co. v. Bradford, 616

DEBTOR AND CREDITOR.
1. If a debtor deposits with his creditor, unconditionally, notes on a third person as collateral security, the latter thereby acquires the control and direction of their collection, and it becomes his duty to take all necessary measures to prevent the discharge of any of the parties thereto; and in such case notice to bring suit on them should be given to him.—Pickens v. Yarborough's Adm'r, 417
2. If the creditor receives the notes under a special agreement, by which he is not to sue, but to collect in any other mode, he must, as to all persons without notice of the extent of his powers, be regarded as the general holder, and notice to sue may be given to him. 417
3. A voluntary conveyance, as against existing creditors, is absolutely void; but to avoid it as against subsequent creditors, it must be shown to have been made with a fraudulent intent.—Stiles & Co. v. Lightfoot, 443
4. A deed of trust which conveys property absolutely for the benefit of specified creditors, although it purports on its face to be tripartite, does not require to be signed by either the trustee or the beneficiaries to give it effect.—Shearer v. Loftin, 703
5. But if the trustee is only authorized to sell the property "at the request of the beneficiaries, or a majority of them in interest," and the deed reserves to the grantor the right of redeeming the property by a specified day, beyond the maturity of the greater part of the secured debts, the assent of the beneficiaries cannot be presumed, and nothing short of the express assent of a majority in interest can render the deed available. 703

DEEDS OF GIFT.
1. A deed of gift, executed in Virginia in 1824, conveying certain slaves,

DEEDS OF GIFT—CONTINUED.

in consideration of natural love and affection, to the grantor's daughter, then a married woman, "and the lawful heirs of her body," contained this clause—"I do bind myself, my heirs, &c., *to make to the above named property a clear and undoubted a right, as much so as can be made by word or deed, from the claim and claims from every person or persons whatsoever*, to my said daughter and her lawful heirs as above mentioned": *Held*, that the deed created a separate estate in the wife, and excluded the husband's marital rights.—Jenkins v. McConico, 213

2. An admission that a deed was executed implies that it was delivered, and a delivery of the deed dispenses with the necessity for a delivery of the property conveyed by it. 213

3. A deed of gift, conveying personal property to a married woman "for her own use and benefit alone," creates a separate estate in her, and excludes her husband's marital rights.—Ozley v. Ikelheimer, 332

4. Deed of gift of a slave, "to my daughter L. during her natural life, and at her death to her child or children; but, in case of the death of my said daughter without lawful issue of her body, then the said negro, and her issue or increase, *to return and belong to my other heirs*:" *Held*, that the term "heirs" was a word of limitation, and not of purchase; and that therefore, upon the death of L. without issue, living the grantor, his other surviving children, who were born before the execution of the deed, took nothing under it.—Couch v. Anderson, 676

DEEDS OF TRUST.

See DEBTOR AND CREDITOR,

FRAUDULENT CONVEYANCES.

DETINUE.

1. In detinue for a slave, if the damages are not proved, a nominal sum only should be given; and it is therefore error to instruct the jury, that, in the absence of proof as to the value of the slave's hire, they might give interest on the agreed value of the slave by way of damages.—Miller v. Jones' Adm'r, 247

2. A plaintiff in detinue may recover upon possession alone against one who has not as good a right to it as himself, and the defendant, in such case, cannot defeat his recovery by showing an outstanding title in a stranger, without connecting himself with it; but when the plaintiff's right of recovery is based on his title, it may always be disproved by showing title in another. 247

3. When the defendant in detinue claims under a purchase at sheriff's sale from one who was estopped from denying the right of possession to be in plaintiff's intestate, he cannot set up an outstanding title in a third person without connecting himself with it. 247

4. The distinctions between the actions of detinue and trover are carefully preserved in the Code, and an amendment of the complaint which would convert an action of detinue into an action of trover cannot be allowed.—Code, § 2403.—Harris v. Hillman, 380

5. In detinue for a slave, a recovery cannot be had against a purchaser

DETINUE—CONTINUED.

at sheriff's sale, who, without notice that plaintiff intended to assert any right to the slave, parted with the possession under a contract of hiring before the suit was commenced. 380

6. In detinue for a slave, a recovery cannot be had against a defendant who was out of possession at the date of the writ, on proof of his prior possession at the time plaintiff's vested remainder fell in by the termination of the precedent life estate, if he afterwards parted with it, without fault, under a contract of hiring, before suit brought or demand made.—Fenner v. Kirkman. 650

DISCONTINUANCE.

1. The failure of the clerk, after a change of venue has been ordered, to transmit a transcript to the clerk of the court to which the trial is removed, and the failure to have the cause entered on the docket of that court at the term next after the order of removal, is no discontinuance of the prosecution.—Harrall v. The State, 52

2. *Mandamus* from the Supreme Court does not lie to compel the Circuit Court to strike a cause from the docket, on motion, on the ground that it has been discontinued by a submission to arbitration.—Ex parte Garlington, 170

DOWER.

1. A sale of real estate by commissioners under an order of tha probate court, does not affect the widow's right of dower; and although the order was made on her application as administratrix, her failure to announce at the sale that the land was sold subject to her dower, does not estop her from asserting her claim.—Owen v. Slatter, 547

2. The statutory jurisdiction conferred on the courts of probate, in the allotment of dower, does not take away the jurisdiction of chancery; and if the widow proceeds in equity for lands in which dower cannot be assigned by metes and bounds, she is not compelled to include in her application all the lands in the county in which she is entitled to dower. 547

ERRORS.

I. WHAT IS REVISABLE ON ERROR.

1. The action of the primary courts in refusing a new trial, is not revisable on error.—Brister et al. The State, 107

2. The refusal of the court to allow counsel, after the argument has been closed and the cause submitted to the jury, to explain a distinction applicable to the case, is not revisable on error: such matters properly belong to the conduct of the cause, and are entrusted to the discretion of the presiding judge.—Chamberlain & Co. v. Masterson, 371

3. The overruling of a motion to nonsuit the plaintiff, when the verdict in his favor is for a less sum than the court can take cognizance of, on the ground that his affidavit does not comply with the requisitions of the statute, (Clay's Digest, p. 325, § 75,) is not revisable on error. McAllister v. McDow, 453

4. The refusal to quash an attachment, on the ground that it was sued out in a case not authorized by law, is not revisable on error.—Gill v. Downs, 670

ERRORS—CONTINUED.

II. WHAT ARE NOT REVERSIBLE ERRORS.

5. Under an indictment for larceny from a store-house, (Code, §§ 3170, 3175,) if the jury assess the aggregate (instead of the separate) value of the stolen articles, the irregularity is not available to the defendant, either on motion in arrest of judgment, or on error.—Case v. The State, 17

6. If the order for a change of venue, in a criminal case, directs the clerk to transmit "the original papers in the cause," it is nevertheless his duty (Code, § 3613) to transmit a transcript; and such order, even if erroneous, is no ground for a reversal of the judgment and sentence of conviction.—Harrall v. The State, 52

7. If the verdict of the jury is received, and read aloud in open court, in the absence of the prisoners, and the jury are then told by the court that they are discharged, it is within the power of the court to call them back before they have left the bar; and if they are immediately recalled, upon the discovery being made that the prisoners are not in court, and the papers in the cause are handed back to them, the prisoners are not deprived of their right to poll the jury, nor can they complain on error of this action of the court.—Brister et al. v. The State, 107

8. The appellant cannot complain, on error, of a charge which was too favorable to him.—Montgomery's Executors v. Kirksey, 172

9. If a demurrer is improperly sustained to a declaration, and the plaintiff then amends, he thereby waives his right to review, on error the decision of the court in sustaining the demurrer.—Stallings v. Newman, 300

10. If the defendant does not take advantage in the court below, by plea or demurrer, of the want of proper parties to the bill, the objection cannot avail on error, unless the absent parties are indispensable to the rendition of a proper decree.—Ozley v. Ikelheimer, 332

11. The wrongful sustaining of a demurrer to a special plea, when the defendant had the full benefit of all the facts alleged in it under his other pleas, is not a reversible error.—Nelson v. Bondurant, 342

12. The exclusion of part of an answer to an interrogatory, which was only admissible (if at all) upon the idea that, when fairly construed, it amounted merely to an expression of the witness' opinion that a slave was worthless, is not a reversible error, when another part of the same answer, which was read in evidence by the appellant, contained a clear statement of the witness' opinion on that point.—Stewart v. Bradford, 410

13. When the defendant pleads not guilty to an action (under the Code) on an open account for services rendered, and judgment is rendered against him on the verdict of the jury, he cannot avail himself of the mispleading on error.—Jordan's Adm'r v. Hubbard and Wife, 433

14. A correct decree, though rendered for a wrong reason, will be affirmed on error.—Stiles & Co. v. Lightfoot, 443

15. When the judgment entry recites, that "the plaintiff came by attorney, and the defendant having failed to file his plea within the time prescribed by law, it is considered by the court, that the plaintiff have and recover of the defendant", &c., "the damages due by the

ERRORS—CONTINUED.

two promissory notes declared on", it will be presumed on error, that the complaint shown by the record was filed before the rendition of the judgment by default.—Letondal v. Huguenin, 552

16. An incorrect abstract charge is not a reversible error, when the record shows clearly that it could not have prejudiced the appellant. Johnson v. Boyles, 576

17. After the dismissal of a bill for want of prosecution, the court has no jurisdiction to reinstate it at a subsequent term; but if the cause is reinstated at a subsequent term, and the defendant craves an appeal from the order, but afterwards engages in the defence—crossing interrogatories, entering into consent, &c.—he thereby waives his objection to the reinstating of the cause, and cannot take advantage of it on error.—Byrd v. McDaniel, 582

18. The objection that an endorsement of the note sued on was read in evidence, "when it was not shown to have been made at the time alleged in the declaration", is not a reversible error, when the record shows that such proof was subsequently made.—Savage & Darrington v. Walshe & Emanuel, 619

19. The rendition of judgment against a defendant who was not served with process, and who did not appear, is a mere clerical mistake, which may be amended on motion in the court below, and the judgment must be regarded as affecting those defendants only who were before the court; and if no motion to amend is made, the mistake furnishes no ground of reversal. 619

20. If the court, after deciding a question of law against the plaintiff, refuses to instruct the jury, on his request, that they have nothing to do with the decision of that question—thereby impliedly admitting their right to revise its decision—the refusal of the charge gives the plaintiff an additional chance for a verdict, and is, therefore, no cause of reversal in his favor.—Wyatt's Adm'r v. Steele, 640

21. A purely abstract charge, which could not have misled the jury, furnishes no ground of reversal.—Rolston v. Langdon, 660

22. Where the evidence set out in the plaintiff's bill of exceptions shows that he was not entitled to recover, the court will not, on error assigned by him, inquire into the correctness of the charges given by the court at the instance of the defendant.—Gilmer & Taylor v. City Council of Montgomery, 665

23. An abstract charge, which asserts a correct legal proposition, is no ground for reversal, when the record shows that it could not have misled the jury.—Taylor v. Morrison, 728

III. WHAT ARE REVERSIBLE ERRORS.

24. A charge is erroneous, which instructs the jury "that, if they found there was a conflict between the special charges given by the court, at the defendant's request, and the main charge, then the latter must prevail."—Spivey v. The State, 90

25. When an attachment is sued out against a steamboat under the act of 1844, to recover damages for injuries caused by her running into a flat-boat, the refusal of the court to strike from the files a declaration against the owners of the boat, is a reversible error.—Owners of Steamboat Farmer v. McCraw. 189

ERRORS—CONTINUED.

26. On a trial of the right of property between plaintiff in execution against the mortgagor and the mortgagee as claimant, it is error to exclude the claimant's mortgage from the jury, if it is not void on its face.—Floyd v. Morrow, 352

27. It is error to instruct the jury, "that the main charge was to be with them the controlling part of the charge."—Chamberlain & Co. v. Masterson, 371

ESTATES OF DECEASED PERSONS.

1. The action of the courts of probate in granting letters testamentary, or of administration, though conclusive in those cases in which they have the power to act, may, like the sentences of all other courts, be assailed for want of jurisdiction; and whenever a suit is brought by a person upon his title as administrator, a plea averring facts which show that the court from which his letters issued had no jurisdiction to grant them, is good.—Miller v. Jones' Adm'r, 247

2. The courts of probate have jurisdiction to grant letters testamentary, or of administration, if property belonging to the estate is brought into the county after the intestate's death, although he was not a resident of this State and had no property here at the time of his death.—Clay's Digest, p. 303, § 33. 247

3. When application is made for letters of administration on the estate of a non-resident, if the petition alleges that "there is property within the county *belonging to the heirs of said estate*, which is likely to be wasted, or so disposed of as to be lost to the said heirs, unless some one should be appointed to administer upon said estate," such an allegation, *it seems*, is equivalent to an assertion of title in the estate; but whether it is or not is immaterial, as it is not the *allegation* in the petition, but the *fact* that there is property in the county belonging to the estate, which gives the court jurisdiction to grant letters of administration, and the applicant is not held down to the ground stated in his petition. 247

4. An executrix held entitled to a credit, on final settlement, for lawful jail fees paid by her to regain the possession of certain slaves belonging to the estate, who had been taken up and committed to jail as runaways, when the evidence showed the following facts: That the executrix was the widow of the testator, and no other person than herself and her children was interested in the estate; that the estate was kept together under the will, and the plantation kept up and cultivated; that the overseer employed by her was cruel and severe towards the slaves, and several of them had previously run away on account of his cruelty, and had been taken up and committed to jail, "for which and other jail fees allowance had been made"; that said overseer made good crops, but was finally discharged by the executrix, in the fall of the same year, on account of his severity to the slaves.—Walker v. Walker, 262

5. Where one of several residuary legatees, who take in common, dies before the testator, his legacy, which lapses by his death, does not survive to his co-legatees, but descends to the testator's next of kin under the statute of distribution, and no interest in it passes to one

ESTATES OF DECEASED PERSONS—CONTINUED.

who takes a life estate by implication in the residuum.—Hamlet v. Johnson, 557

6. On petition to the probate court for the distribution of slaves not disposed of by will, if the number of distributees exceeds the number of slaves to be divided, the court may order a sale in the first instance, without the appointment and report of commissioners. 557

ESTOPPEL.

1. If a party reads in evidence to the jury a certified copy of a deed which purports to have been executed by husband and wife, without any attempt to limit its effect as proof, he hereby concedes its genuineness, and cannot be heard, in an appellate court, to say that it was not proved; although, according to the memorandum endorsed on it by the clerk of the court in which it was recorded, it was admitted to record on the acknowledgment of the husband alone, and the party against whom it was offered "admitted that the original had been executed, proved, acknowledged, and recorded, as endorsed and certified on said copy."—Jenkins v. McConico, 213

2. If one who has possession of a slave disclaims property in himself, and holds it for the estate of his father, he is estopped from denying the right of possession to be in the estate; and his declarations, in disparagement of his own title, are admissible evidence against him, or one claiming under him, to show the character of his possession.—Miller v. Jones' Adm'r, 247

3. When the defendant in detinue claims under a purchase at sheriff's sale from one who was estopped from denying the right of possession to be in plaintiff's intestate, he cannot set up an outstanding title in a third person without connecting himself with it. 247

4. In an action for deceit against a tinner, who followed the business of putting tin roofs on houses, for that he falsely and fraudulently represented that he would put a tin roof on plaintiff's house which would not leak for twenty years, whereas the said roof did leak before the expiration of two years, a partial payment made by plaintiff after discovering that the roof leaked, without objecting to it on that ground, is a circumstance to be weighed by the jury in determining whether any fraud was practiced by the defendant, but it cannot operate as an estoppel *in pais*, nor as a release or waiver of an existing cause of action.—McGar v. Williams, 469

5. A sale of real estate by commissioners under an order of the probate court, does not affect the widow's right of dower; and although the order was made on her application as administratrix, her failure to announce at the sale that the land was sold subject to her dower, does not estop her from asserting her claim.—Owen v. Slatter, 547

6. A bill was filed, setting up an equitable estoppel, to perpetually enjoin the defendant from asserting his legal title to a tract of land which he had verbally sold to one W., who sold to S., who sold to complainant. It alleged, that W. agreed to sell to S. if defendant would sanction the sale and recognize his verbal contract, and that they together called on him to ascertain whether he would do so; that defendant replied, that he did recognize the validity of his contract,

ESTOPPEL—CONTINUED.

that he was willing that W. might sell to S., and that he would look to the former for the payment of his purchase money. The answer admitted these facts, but denied that defendant thereby intended to surrender his right to look to the land as a security for the purchase money, or to do more than recognize the validity of his verbal contract; *Held*, that the injunction was properly dissolved on the coming in of this answer, as the facts admitted by it were not sufficient to create an estoppel.—Jones v. Cowles, 612

EVIDENCE.

I. ADMISSIBILITY AND RELEVANCY.

1. Under an indictment for retailing without a license, (Code, § 1059,) evidence that the intemperate habits of the person to whom the liquor was sold were generally known in the community, is irrelevant and inadmissible: the fact that his intemperate habits were generally known in the community, does not justify the inference that they were known to the defendant.—Stanley & Elliott v. The State, 26

2. Any fact which tends to prove the real motive of the prisoner in killing the deceased, or the purpose of the deceased in going to the prisoner's house, or that the prisoner knew, at the time of the killing, that the deceased and his companions did not intend to commit any felony, nor to do him any great bodily harm, is relevant evidence.—Noles v. The State, 31

3. Where three are jointly indicted for an assault with intent to murder, but are tried separately, a letter written by one of them to the prosecutor some time before the commission of the assault, showing malice and ill-will on the part of the writer towards the prosecutor, is not admissible evidence against another who, though *particeps criminis* in the assault, is not shown to have had any connection whatever with the writing of the letter, nor to have acted in concert with the writer, nor to have participated in his ill-will towards the prosecutor.—Stewart v. The State, 44

4. But, *it seems*, if the defendants had entered into a conspiracy to kill the prosecutor, and the letter was subsequently written by one of them to bring on the difficulty, or in furtherance of their common design, it would be admissible evidence against all of them, the act of each, in furtherance of the common design, being deemed in law the act of all. 44

5. Under an indictment against a negro trader for exhibiting slaves for sale without a license, (Pamph. Acts 1849-50, p. 8,) after evidence has been offered of a particular act of sale within the time covered by the indictment, evidence of a previous act more than twelve months before the finding of the indictment is admissible for the State, as tending to show that the defendant was engaged in the business of negro-trading.—Chambers v. The State, 59

6. Under an indictment for stealing a slave (Code, § 3130), any evidence tending to prove that the defendant honestly believed that he had the right to carry away and sell the slave, is admissible for him; and therefore, where defendant had possession of the slave under a bailment from the former owner, (since deceased,) the declarations

EVIDENCE—CONTINUED.

of the bailor, tending to show a sale to defendant, are competent evidence, although referring to a paper which is not produced and whose absence is not accounted for.—Spivey v. The State, 90

7. On the trial of an indictment for arson, after the State has proved the burning of the house as charged, and offered evidence tending to show that the defendant was the person who set fire to it, evidence showing that another house belonging to the prosecutor was subsequently burned, is irrelevant and inadmissible; nor is it made relevant by being offered in connection with proof of defendant's declaration, made after the first but before the second burning, that he was not yet done with the prosecutor, especially when the declaration is shown to have been made in a conversation, in which "no reference was made to either of the burnings, but the parties were speaking of a civil case which defendant had before the prosecutor as a justice of the peace, and in which defendant complained the prosecutor had treated him rascally."—Brock v. The State, 104

8. When female relatives of the defendant, whose evidence is material to his defence, are examined on his behalf at the trial, they cannot be impeached by proof that they were present at the examination before the committing magistrate, and were not then examined as witnesses, although the same evidence was then adduced against him as upon the trial. 104

9. In case against a municipal corporation, to recover damages for its neglect of duty in suffering plaintiff's land to be overflowed by the rain water which passed through the sewers in the streets of the city, and accumulated in a ravine emptying into the river, a witness cannot be asked, on behalf of the defendant, "if there were not other ravines in the city which had increased in size for the last twenty years in as great proportion as this ravine had increased."—Gilmer & Taylor v. City Council of Montgomery, 665

10. It being shown that plaintiff had built a wall and embankment on his land, which extended partly across the ravine and narrowed the channel through which the water flowed into the river, a witness for the defence, who had been for many years engaged in building brick walls and houses, may be asked "if he did not tell plaintiff, that if he built said wall in said ravine, it would fall by reason of the flood in said ravine." 665

II. ADMISSIONS AND CONFESSIONS.

11. If a part of a conversation is adduced in evidence by the State, as proving the defendant's declarations or confessions of guilt, he has the right to call for the whole of what was said in that conversation relative to the subject-matter in issue.—Chambers v. The State, 59

12. The object of a demurrer to evidence is, not to substitute the judge for the jury as a trier of the facts, but to ascertain the law upon an admitted state of facts; and its effect, when issue is joined, is to admit every fact which the testimony tends to establish.—Bryan v. The State, 65

13. A witness who is introduced by the State to prove the defendants' confessions, and who states, on re-examination, "that he had testi-

EVIDENCE—CONTINUED.

fied to the substance of all that each of said defendants stated on that occasion, but that they may have stated something which he did not recollect", is competent to testify to the confessions, if in themselves admissible.—Brister v. The State, 107

14. The general rules stated, which should govern the court in deciding upon the competency of confessions, and the jury in determining their credibility and effect after they have been admitted by the court. Distinction also stated between the sphere of the judge and the sphere of the jury. 107

15. As to the construction of the bill of exceptions, which showed two separate objections by the defendants to the admission of their confessions: It was *held* by a majority of the court, that the last of these objections was so made as to present the question, whether upon the evidence previously set out in the bill of exceptions the confessions were admissible, and that the court below erred in overruling this objection and admitting the confessions; while RICE, J., *dissenting*, held that there was no error shown by the record in overruling either of said objections. 107

16. Charge of the court on the subject of confessions, and its refusal to charge as requested, held correct. 107

17. If a party reads in evidence to the jury a certified copy of a deed which purports to have been executed by husband and wife, without any attempt to limit its effect as proof, he thereby concedes its genuineness, and cannot be heard, in an appellate court, to say that it was not proved; although, according to the memorandum endorsed on it by the clerk of the court in which it was recorded, it was admitted to record on the acknowledgment of the husband alone, and the party against whom it was offered "admitted that the original had been executed, proved, acknowledged, and recorded, as endorsed and certified on said copy."—Jenkins v. McConico, 213

18. An admission that a deed was executed implies that it was delivered, and a delivery of the deed dispenses with the necessity for a delivery of the property conveyed by it. 213

19. When husband and wife sue jointly for services rendered by the wife during coverture, her admissions of payment cannot be received in evidence against them.—Jordan's Adm'r v. Hubbard and Wife, 433

III. BURDEN, SUFFICIENCY, AND WEIGHT OF PROOF.

20. If the defendant was engaged in the business of negro-trading, proof of one act, in pursuance of such business, within the county in which the indictment was found, is sufficient to support a conviction.—Chambers v. The State, 59

21. The object of a demurrer to evidence is, not to substitute the judge for the jury as a trier of the facts, but to ascertain the law upon an admitted state of facts; and its effect, when issue is joined, is to admit every fact which the testimony tends to establish.—Bryan v. The State, 65

22. Under an indictment for gaming, (Code, § 3243,) upon demurrer to the evidence, the defendant may be convicted on proof of his having played a game of "ramps" in a store-house where spirituous liquors were at the time retailed. 65

EVIDENCE—CONTINUED.

23. Under an indictment for gaming, the defendant may be convicted on proof "that he and another each put up money and threw dice for it, by placing the dice in a box and throwing three times each, the one throwing the highest number taking the money"; although it is also shown "that the mode of procedure and of throwing the dice was the same as in the case of raffling for property."—Jones v. The State, 155
24. On bill filed to have a deed absolute on its face declared a mortgage, a writing executed by the grantee several months after the original deed, reciting that it was agreed between him and the grantor, at the time the deed was executed, that if the latter re-paid to him by a specified day the amount of the consideration money expressed in the deed, then he would re-convey to him all the property therein mentioned, and binding himself to re-convey accordingly,—is evidence of the highest character against the grantee; and although it may not be sufficient, of itself, to show that the parties intended the deed to operate as a mortgage, yet if the other evidence in the case, taken in connection with it, establishes that to have been the purpose of the parties, or even renders it doubtful whether a mortgage or a conditional sale was intended, it is enough to induce a court of equity to declare it a mortgage.—Locke's Executor v. Palmer, 312
25. The fact that the debtor's notes are given up to him by the creditor, and no acknowledgment or other evidence of the debt retained, is a strong circumstance to show that the relation of debtor and creditor was destroyed, but it is not conclusive. 312
26. If the holder of a note, having bound himself by written contract to account for it to the owner, recovers judgment on it in his own name, and by private agreement with the sheriff, after a sale under execution, takes the property at the purchaser's bid, he thereby becomes liable to the owner of the note for the amount in money, and cannot raise objections to the sale of which the defendant in execution might avail himself; and if the amount was lessened by expenses, court costs, &c., the *onus* of proving it devolves on him.—Hudson v. Crow, 515

IV. MOTIONS TO EXCLUDE, &c.

27. On a change of venue in a criminal case, the certified copy of the indictment may be read to the jury on the trial; and therefore, if the entire transcript, containing a copy of the indictment, is offered to the jury, and the defendant objects to it as a whole, his objection may be overruled.—Harrall v. The State, 53
28. An objection to the competency of a witness, on the ground of interest, must be distinctly made at the first opportunity, and cannot be subsequently raised; and if the party, in accepting service of interrogatories, stipulates that he hereby "waives no objection to their legality, pertinency, relevancy, or competency", this will not enable him afterwards to object to the competency of the witness on account of interest.—Hudson v. Crow, 515
29. A general objection to an entire deposition, when a portion of it contains legal evidence, may be overruled. 515
30. A motion to exclude evidence, a part of which is legal, may be over-

EVIDENCE—CONTINUED.

ruled, since the court is not authorized to reject that portion which is proper, nor required to sift the evidence so as to separate the legal from the illegal.—Wyatt's Adm'r v. Steele, 639

31. If a question calls for evidence irrelevant to the issue, an objection to it is sufficient to exclude the evidence, without a separate objection to the answer —Gilmer & Taylor v. City Council of Montg'y, 665

V. OPINIONS, QUESTIONS OF FACT, AND LEGAL CONCLUSIONS.

32. Whether a person is "a man of known intemperate habits," is a question of fact to which a witness may depose.—Stanley & Elliott v. The State, 26

33. Although the opinion of a physician as to the length of time a disease has existed, predicated upon present symptoms, is not equal to positive proof of the fact of its existence; yet, where he testifies to the existence of certain diseases from a personal examination, upon which he founds his opinion as to the length of time they have existed, it is error to instruct the jury, "that the testimony of physicians is matter of opinion merely."—Bennett v. Fail & Patterson, 605

34. On a question of the soundness of a slave, a witness may testify that "she *appeared to be healthy*;" and if the party against whom the evidence is offered desires to ascertain what the appearances were which the witness denominated healthy, he must elicit such proof on cross-examination. 605

35. The declarations of a slave, made while sick to a physician, as to his symptoms and condition during previous similar attacks, upon which the physician in part relies in forming his opinion as to the duration and character of the disease, are competent evidence as furnishing the basis in part of that opinion, but for no other purpose.—Eckles & Brown v. Bates, 656

36. But the slave's declarations to other persons not skilled in the science of medicine, as to his previous attacks, the medicines which he then took, and his opinion that those attacks were similar to his present sickness, are not admissible evidence. 656

VI. PAROL, WHEN ADMISSIBLE TO AFFECT WRITTEN.

37. It is the duty of the court to declare the legal effect of a record which is offered to sustain the plea of *autrefois acquit* or discontinuance, and the record itself cannot be gainsayed by parol proof; therefore, the court may charge the jury, that the pleas are not sustained by the proof, when that is the case.—Martha v. The State, 72

38. A bill of lading may partake of the character of both a receipt and a contract, and in the latter quality cannot be varied or contradicted by parol evidence; but this principle does not apply to parol testimony which shows that it is the contract of other persons than him in whose name it is executed.—McTyer v. Steele, 487

39. A judgment is final and conclusive between the parties, when rendered on a verdict on the merits, not only as to the facts actually litigated and decided, but also as to all facts necessarily involved in the issue; and if a particular matter, which was not necessarily involved in the issue, but which the issue was broad enough to cover,

EVIDENCE—CONTINUED.

actually arose and was determined, it may be connected with the record by evidence *aliunde*.—Chamberlain v. Gaillard, 504

40. The consideration clause in a bill of sale of a slave, though under seal, is open to explanation by parol evidence; as, where a consideration in money is expressed, it may be shown to have been another slave.—Eckles & Brown v. Carter, 563

41. When a deed purports on its face to be made, not only in consideration of natural love and affection, but also "for divers other good considerations" which are not specified, parol evidence is admissible to show what the other considerations were.—Johnson v. Boyles, 576

42. The construction of an order of sale, made by the orphans' court, is a question for the court, and not for the jury, and must be determined from an inspection of the record alone, without the aid of evidence *aliunde* to show its meaning: similar orders, made by the same judge in other cases, are *res inter alios actæ*.—Wyatt's Adm'r v. Steele, 639

VII. RES GESTÆ.

42. The defendant's declarations, made while he was in possession of the slave, "as to the manner in which he bought him," are not admissible evidence for him under an indictment for stealing the slave (Code, § 3130.)—Spivey v. The State. 90

43. If one who has possession of a slave disclaims property in himself, and holds for the estate of his father, he is estopped from denying the right of possession to be in the estate; and his declarations, in disparagement of his own title, are admissible evidence against him, or one claiming under him, to show the character of his possession.—Miller v. Jones' Adm'r, 247

44. The words declared on as slanderous, charging plaintiff with having murdered defendant's son, being shown to have been spoken while defendant and witness were alone together, going to a neighbor's house to get him to read a letter which defendant had received relative to his son's death, *held*, that defendant's declaration to witness, made in the same conversation, "that his wife was much distressed on account of her son's death", was admissible evidence for him, as tending to show that the words spoken were prompted by grief rather than malice.—Stallings v. Newman; 300

45. Evidence of a demand of specie by the sheriff, by the direction of the plaintiff in execution, after the property had been bid off, and of the purchaser's offer to pay in current bank-notes with the difference between them and specie, is admissible as part of the *res gestæ*.—Hudson v. Crow, 515

46. The written declarations of the grantor, while in possession of the slaves conveyed, to the effect that he held for the grantee, are admissible evidence as part of the *res gestæ* explanatory of his possession.—Johnson v. Boyles, 576

47. In trespass to recover damages for the battery of a slave, plaintiff introduced a witness who testified, that defendant and one R. were chasing the slave as a runaway with a pack of trained dogs belonging to defendant; that he heard the report of a gun, or pistol, in the direction the dogs were trailing, and when he reached a certain

EVIDENCE—CONTINUED.

fence the defendant came up to him from a swamp on the opposite side of the field, "and told him that he came up with the negro in the field on horseback, that the negro turned on him with a large stick, that he retreated to keep out of the way of the negro, who said he would die before he would be taken, that he went to R. and got his pistol, and pursued the negro to the swamp, and came up near to him, and shot him just as the negro was turning on him:" *Held*, that defendant's declarations to said R. at the time he got the pistol and pursued the slave, in explanation thereof, were competent evidence for him as a part of the *res gestæ*.—Dearing v. Moore. 586

48. The declarations of a slave, made while sick to a physician or any other person, relative to the symptoms and nature of the disease under which he is laboring, are admissible evidence upon the principle of *res gestæ*, as well as from the necessity of the case.—Eckles & Brown v. Bates, 655

49. The slave's declarations, also, as to his symptoms and condition during previous similar attacks, upon which the physician in part relies in forming his opinion as to the duration and character of the disease, are competent evidence on the same principle, as furnishing the basis in part of that opinion, but for no other purpose. 655

50. But the slave's declarations to other persons not skilled in the science of medicine, as to his previous attacks, the medicines which he then took, and his opinion that those attacks were similar to his present sickness, are not admissible evidence. 655

51. In trover for the conversion of a slave, the declaration of defendant's vendor, "that he had promised to give the slave to the plaintiff," is not admissible evidence against defendant, being neither explanatory of possession, nor in disparagement of title.—Mobley v. Barnes, 718

EXCEPTIONS, BILL OF.

1. As to the construction of the bill of exceptions, which showed two separate objections by the defendants to the admission of their confessions: It was *held* by a majority of the court, that the last of these objections was so made as to present the question, whether upon the evidence previously set out in the bill of exceptions the confessions were admissible, and that the court below erred in overruling this objection and admitting the confessions; while RICE, J., *dissenting*, held that there was no error shown by the record in overruling either of said objections.—Brister et al. v. The State, 107

EXECUTORS AND ADMINISTRATORS.

1. The action of the courts of probate in granting letters testamentary, or of administration, though conclusive in those cases in which they have the power to act, may, like the sentences of all other courts, be assailed for want of jurisdiction; and whenever a suit is brought by a person upon his title as administrator, a plea averring facts which show that the court from which his letters issued had no jurisdiction to grant them, is good.—Miller v. Jones' Adm'r, 247

2. When a plaintiff declares upon his title as administrator by virtue of letters granted to him in this State, a plea averring that his intestate

EXECUTORS AND ADMINISTRATORS—CONTINUED.

was not a resident of this State at the time of his death, and that he had no effects here at that time, does not show that the letters are void for want of jurisdiction in the court which granted them. 247

3. The assent of an executrix to a specific legacy to herself of a life estate in two slaves, will be presumed, when the facts are, that she is the widow of the testator; that she did not dissent from the will, although it would have been greatly to her pecuniary advantage to do so; that she promptly qualified as executrix, and kept the estate together (under the will) for three years, for the purpose of raising and educating the children; that in the meantime, by her industry, economy, and prudent management of the estate, she totally exonerated it from all indebtedness; and that she ceased to be executrix after all the debts were paid, and claimed a credit on final settlement of her administration for services rendered by said slaves to the estate after the testator's death.—Walker v. Walker, 262

4. In such case, her assent, though not given until all the debts of the estate were paid, or even until the day before she ceased to be executrix, relates back to the testator's death, and she is entitled to a credit for the value of the services of the slaves to the estate, as proved, from the testator's death. 262

5. Under the statutes of this State, where the testator does not devise his real estate *to* his executors, nor *to* any other person, and does not dispose by his will of the rents and profits accruing after his death, his executors, if they have not exercised the power of sale conferred on them by the will, and if the estate is solvent, may maintain any action for the recovery of the lands which the administrator of a solvent estate might maintain for the lands of his intestate.—Patton v. Crow, 426

6. An administratrix having received money, "to which plaintiff was entitled as one of the distributees of the estate, all the other distributees having received their respective shares", let her husband have some of it, at his request, to lend to another person; her husband loaned it out accordingly, taking a note payable to himself, which he "deposited with his said wife for the use and benefit of plaintiff, that she might get the money"; after his death, his executors demanded and received from her the said note and the money on hand, with notice that they belonged to plaintiff and not to their testator, and subsequently collected the money due on the note: *Held*, that plaintiff might maintain an action at law against them for the money thus received and collected, and that satisfaction of the judgment recovered against them would be an extinguishment of the debt due from the administratrix. Prater v. Stinson and Wife, 456

7. When an execution from the probate court against an executor or administrator has been returned "no property found", an execution may issue against him and his sureties, (Code, § 1922,) but the court is not authorized to render a judgment against the sureties on such return; and if one of the sureties die before the return of "no property" against his principal, the summary statutory remedy entirely fails as to him, and cannot be revived by *scire facias*.—Kirby's Adm'r v. Anders, guardian, &c., 466

8. If an administrator, wishing to avoid the statutory requisition as to the

EXECUTORS AND ADMINISTRATORS—CONTINUED.

payment of interest on the funds in his hands, makes affidavit that he "always had on hand, or within his immediate control, a sum sufficient to pay the amount due by him as administrator," but does not deny that he used the trust funds, he is chargeable with interest.—Clay's Digest, p. 199, § 28; Code, § 1813.—Farmer's Distributees v. Farmer's Adm'r, 671

9. The act of 1850, which provides (Pamphlet Acts 1849-50, p. 32, § 28) "that partial settlements, whether of executors, administrators, or guardians, shall on final settlement be considered as only *prima facie* correct," does not retro-act upon settlements made before its passage, Duke's Adm'r v. Duke's Distributees, 673

10. If, on an annual or partial settlement made by an administrator under the act of 1843, all the proper parties being regularly before the court, an issue is made up respecting the validity of certain items, and fully tried by the parties before the court, the judgment given upon them, whether allowing or rejecting them, so long as it remains unreversed, is as conclusive as if rendered on final hearing, and may be pleaded in bar on the final settlement. 673

11. Under the act of February 7, 1854, (Pamphlet Acts 1853-54, p. 24,) the probate court has jurisdiction, on the petition of the distributees of an intestate's estate, whose administrator has died without settling his accounts, to cite the personal representative of such deceased administrator, and have an account and settlement of his administration on the original estate, "as fully and completely" as could have been made by such deceased administrator himself, if alive; and the meaning of the proviso to the third section is, that the personal representative of the deceased administrator shall be personally liable on such settlement only to the amount of the assets of his intestate's estate which have come to his hands.—Howard's Dist's v. Howard's Adm'r, 682

12. An order of the probate court, made on the application of two co-executors, for the allowance to each of a specified sum as annual compensation for his services in the management of the estate, will not support an action at law in favor of one of them, or his assignee, against the other.—Carver v. Hallett, executor, &c., 722

FINES AND FORFEITURES.

1. The power to remit fines and forfeitures is confided by the State constitution to the governor alone, and cannot be exercised by the Legislature; and therefore any act of the Legislature which attempts, directly or indirectly, to remit a fine, either before or after it has been paid, is unconstitutional.—Haley v. Clark, 439

2. Therefore the act of February 2, 1850, (Pamph. Acts 1849-50, p. 452,) entitled "An act for the relief of the securities of Joseph Douglass, late clerk of the Circuit Court of Marion county," is unconstitutional. 439

FIXTURES.

1. In the United States, public policy requires, (and the adjudicated cases have decided,) that the same protection which the common law in England afforded to fixtures erected for the purposes of trade, should be extended to erections for agricultural purposes.—Harkness v. Sears & Walker, 493

FIXTURES—CONTINUED.

2. As between vendor and vendee, the stationary machinery by which turning-lathes or other portable machines which are of equal value everywhere are impelled, if erected on the land by the vendor during his ownership, for his own use, for the purposes of either trade or agriculture, and fixed in or to the ground, or to some substance which has already become a part of the freehold, are irremovable fixtures, which pass to the vendee under the deed for the land. 493

FRAUDS AND FRAUDULENT CONVEYANCES.

1. The relationship of all the parties to a deed of trust made by an insolvent debtor furnishes no predicate for a legal presumption or conclusion of fraud, although it is a circumstance which may go to the jury, to be considered by them, in connection with the other facts in the cause, in determining the question of fraud in fact; but if the court, in charging hypothetically upon the facts, predicates the conclusion of fraud upon the fact of such relationship, in connection with other facts which, if true, are in themselves sufficient to render the deed fraudulent in law, the charge is too favorable to the claimant under the deed, and he therefore cannot complain of it on error.—Montgomery's Executors v. Kirksey, 172

2. A deed of trust, executed by an insolvent debtor, conveying all his property in trust to secure the payment of a portion of his debts then past due, leaving other creditors unprovided for, and stipulating that the grantor should retain the possession of all the property until the law day of the deed, and for such longer period as the sale might be postponed by the secured creditors, and that the surplus after paying the secured debts and expenses should be refunded to him,—is fraudulent and void in law as against the unsecured creditors. 172

3. The facts that the defendant's father became the purchaser of all the property at the trustee's sale under the deed, and suffered it to go back to the defendant's possession immediately after the sale, "with permission to get a subsistence for himself and family, but to turn over all beyond this to his father, and that the property was to be under the general supervision and control of his brother as agent of his father," do not, if the deed was *bona fide*, and the purchase fairly and honestly made, justify any presumption of fraud, nor raise any question under the statute respecting three years' possession under a pretended loan. The uncertainty in the amount of compensation by way of maintenance, is a circumstance for the consideration of the jury in determining the question of fraud, which, if all the previous transactions were *bona fide*, the fact of relationship may serve to explain; and the rule which makes the retention of possession of personal property by the vendor *prima facie* evidence of fraud, does not apply to sales at public auction after notice. 172

4. Under the statute in relation to pretended loans of personal property, (Clay's Digest, p. 254, § 2,) three years' uninterrupted possession by the loanee is required to make the property subject to his debts: if the lender, with the view of avoiding the effect of the statute, resumes the possession before the expiration of three years, and retains it for one or two days, this cuts off the statute at that point, and the loanee's

FRAUDS AND FRAUDULENT CONVEYANCES—CONTINUED.

subsequent possession will date from the time when the property is restored to him. 172

5. Although three years' possession of slaves by the loanee makes them under this statute subject to his debts, this does not give his creditors a right to crops partly grown by them, or other products of their labor, which have not been in his possession three years. 172

6. A promise by a father, upon valuable consideration, to make his daughter equal in property to his other children, or to give her so much as would make her share equal to a given portion of his estate—as, one-fourth, one-fifth, &c.—is not within the statute of frauds, although his estate consists entirely of lands, and although its execution may be postponed by circumstances beyond a year and a day.—Adams and Wife v. Adams, 272

7. A voluntary conveyance, as against existing creditors, is absolutely void; but to avoid it as against subsequent creditors, it must be shown to have been executed with a fraudulent intention.—Stiles & Co. v. Lightfoot, 443

8. And where a subsequent creditor takes a mortgage to secure his debt, but does not incur any new responsibility for it, nor waive any right or lien, nor part with anything to obtain it, he is not entitled to relief in chancery against a previous voluntary conveyance of the same property, without averring and proving that such conveyance was made with a fraudulent intent. 443

9. The evidence in this case held insufficient to establish a fraudulent intent in the execution of the voluntary conveyance, on the ground that fraud cannot be imputed to any one when the facts and circumstances out of which it is supposed to arise may well consist with honesty and purity of intention. 443

10. The statute of frauds (Clay's Digest, p. 255, § 2) in relation to conveyances of personal property "upon consideration not deemed valuable in law", does not apply to a deed which purports to be made in consideration of natural love and affection "and for divers other good considerations", and which is shown by parol to have been made upon valuable consideration.—Johnson v. Boyles, 576

11. A purchaser without notice from a person in possession of a slave which does not belong to him, does not necessarily obtain a good title; and therefore a charge which, in effect, asserts that he does, is properly refused. 576

12. A deed of trust which conveys property absolutely for the benefit of specified creditors, although it purports on its face to be tripartite, does not require to be signed by either the trustee or the beneficiaries to give it effect.—Shearer v. Loftin, 703

13. But if the trustee is only authorized to sell the property "at the request of the beneficiaries, or a majority of them in interest," and the deed reserves to the grantor the right of redeeming the property by a specified day, beyond the maturity of the greater part of the secured debts, and does not show that the property conveyed is sufficient to pay all the secured debts, the assent of the beneficiaries cannot be presumed, and nothing short of the express assent of a majority in interest can render the deed available. 703

GAMING.

1. The right to a perpetual injunction of a judgment at law founded on a gaming consideration, although the plaintiff therein is an innocent holder for valuable consideration, and no defence at law was attempted, is not affected by an erroneous decree of the chancellor dismissing the bill and dissolving the injunction; and if the collection of the money is afterwards coerced by execution, it may be recovered in an action for money had and received, if commenced within six years from the reversal of the decree on error and the award of a perpetual injunction.—Paulling v. Watson, 205

See Criminal Law, 23, 24, 25, 26, 27, 31, 32, 35, 60.

GUARANTY.

1. Plaintiff having agreed with S. & P., who were mail contractors, to keep their drivers and horses at a stipulated sum per annum, payable quarterly, and during the last quarter, on their becoming insolvent, having refused to keep their drivers and horses without security, thereupon defendant, at the request of S. & P., wrote to plaintiff, saying "I will see you paid for this quarter, as their time then expires, payable when due in Alabama bank-notes"; plaintiff kept the drivers and horses until the expiration of the quarter, and the agent of S. & P. afterwards closed their account by giving the note of the surviving partner, payable one day after date, which was filed as a claim against the estate of the deceased partner. *Held*, that defendant's promise was an original undertaking, upon a new and sufficient consideration, which, upon its acceptance by plaintiff, discharged the debt of S. & P., and bound defendant to pay, at the expiration of the quarter, in Alabama bank-notes.—Jolley v. Walker's Adm'rs, 690

HOMICIDE.

See Criminal Law, 5, 6, 9, 19, 58.

HUSBAND AND WIFE.

1. A deed of gift, executed in Virginia in 1824, conveying certain slaves, in consideration of natural love and affection, to the grantor's daughter, then a married woman, "and the lawful heirs of her body," contained this clause—"I do bind myself, my heirs, &c., *to make to the above named property a clear and undoubted a right, as much so as can be made by word or deed, from the claim and claims from every person or persons whatsoever*, to my said daughter and her lawful heirs as above mentioned": *Held*, that the deed created a separate estate in the wife, and excluded the husband's marital rights.—Jenkins v. McConico, 213

2. Where personal property is conveyed directly to the wife, to her sole and separate use, she and her husband may, by their joint deed, vest the legal title in trustees for their use and the use of the survivor for life; and the husband, surviving, may set up such deed to defeat an action of trover brought against him by the wife's personal representative. 218

HUSBAND AND WIFE—CONTINUED.

3. If the husband sell or dispose of the wife's separate personal property without her consent, express or implied, her right of action is suspended during coverture only: if she survive, she may sue his personal representative for the conversion; and if he survive, her personal representative may sue him. 213
4. The act of 1846, "to protect the rights of married women," (Pamph. Acts 1845-6, p. 23,) does not, of itself, and without any act on the part of the wife, destroy her right to a settlement out of her choses in action and equitable interests as it existed before the adoption of that act; but the intention of the act was, to tender to her what was supposed to be a more valuable right, and to leave it to her election to claim the benefit of the act, or to assert her equity to a settlement without regard to its provisions.—Blevins v. Buck, 292
5. After the rendition of a final decree, on a bill filed under this act, vesting the property in a trustee for the sole and separate use, support and maintenance of the wife and her family, the wife may, during coverture, create a charge upon the property, which may be enforced by a bill filed after her death, and by a sale of the entire property, if necessary, under a decree of the court. 292
6. A deed of gift, conveying personal property to a married woman "for her own use and benefit alone," creates a separate estate in her, and excludes her husband's marital rights.—Ozley v. Ikelheimer, 332
7. If a married woman gives her written obligation for the payment of money, it will be presumed that she intended thereby to charge her separate personal estate; and therefore, if her creditor files a bill in equity to obtain payment out of her separate personal estate, it is not necessary that he should aver or prove her intention to charge that estate. 332
8. Husband and wife may join, under the Code (§ 2131) as at common law, to recover upon a promise made to the wife for services rendered by her during coverture.—Jordan's Adm'r v. Hubbard and Wife, 433
9. When husband and wife sue jointly for services rendered by the wife during coverture, her admissions of payment cannot be received in evidence against them. 433

INDICTMENT.

See CRIMINAL LAW.

INFANCY.

1. Although the deed of an infant is voidable only, and not absolutely void, yet he will not be required, in a court of law, to refund the purchase money, when it is not shown to have been in his possession, either actually or constructively, after he attained his majority, as a pre-requisite to an avoidance of his deed by suit for the land.—Manning v. Johnson, 446
2. After a recovery of the land by the infant, in such case, the purchaser may recover back the money by suit, especially where he was induced to enter into the contract by the infant's false representation that he was of full age. 446

INFANCY—CONTINUED.

3. *It seems*, however, that if the infant, after he arrives at full age, is possessed of the consideration paid him, whether it be property, money, or choses in action, and either disposes of it so that he cannot restore it, or retains it for an unreasonable length of time, this amounts to an affirmance of his contract. 446

INNKEEPERS.

1. As to the distinction between guests and boarders at a hotel, and the liability of the landlord to each for the loss of goods.—Chamberlain & Co. v. Masterson, 371
2. If a boarder at a hotel fails to take such care of his watch as a person of ordinary prudence should take, the landlord will not be responsible for its loss. 371

JOINT TENANTS AND TENANTS IN COMMON.

1. A misjoinder of plaintiffs in an action of trespass *quare clausum fregit* will defeat a recovery; but there is no such misjoinder when the executors of a deceased tenant in common join with the surviving tenant.—Patton v. Crow, 426
2. In an action to recover damages for the conversion of a chattel, if the plaintiff is the several owner, he would be entitled to recover upon proof of a demand and refusal; but if his interest had never been separated, he could not recover against a co-owner, without proving also that the conversion went to the destruction of the chattel, or the exclusion of his right.—Allen v. Harper, 686

JUDGMENTS AND DECREES.

1. A judgment in favor of the prosecutrix in a bastardy proceeding, "for her costs in this behalf expended," and requiring the defendant to enter into bond "conditioned that he pay to the judge of probate fifty dollars on the *first day* of January in each year for the term of ten years," &c.,—is materially different from a judgment requiring him to enter into bond "conditioned to pay fifty dollars a year for the period of ten years on the *first Monday* in January in each year," &c.—Williams v. The State, 85
2. The action of the courts of probate in granting letters testamentary, or of administration, though conclusive in those cases in which they have the power to act, may, like the sentences of all other courts, be assailed for want of jurisdiction; and whenever a suit is brought by a person upon his title as administrator, a plea averring facts which show that the court from which his letters issued had no jurisdiction to grant them, is good.—Miller v. Jones' Adm'r, 247
3. A judgment quashing an execution, on the ground of the defendant's discharge in bankruptcy, although the court refuses to order satisfaction or discharge of the original judgment to be entered, or a perpetual stay of execution, relates back to the original judgment; and its effect, so far as respects the rights of the parties to that judgment, is to vacate all process issued for its satisfaction.—Ewing v. Peck, 418
4. A probate judge has no jurisdiction, except when sitting as a court in

JUDGMENTS AND DECREES—CONTINUED.

term time, to take a confession of judgment from the defendant in a bastardy proceeding; such a judgment, therefore, is *coram non judice*, and void.—Moore v. McGuire, 461

5. But, *it seems*, the court may declare such judgment void, and proceed with the cause from the last previous continuance. 461

6. A judgment is final and conclusive between the parties, when rendered on a verdict on the merits, not only as to the facts actually litigated and decided, but also as to all facts necessarily involved in the issue; and if a particular matter, which was not necessarily involved in the issue, but which the issue was broad enough to cover, actually arose and was determined, it may be connected with the record by evidence *aliunde*.—Chamberlain v. Gaillard, 504

7. If, on an annual or partial settlement made by an administrator under the act of 1843, all the proper parties being regularly before the court, an issue is made up respecting the validity of certain items, and fully tried by the parties before the court, the judgment given upon them, whether allowing or rejecting them, so long as it remains unreversed, is as conclusive as if rendered on final hearing, and may be pleaded in bar on the final settlement.—Duke's Adm'r v. Duke's Distributees, 673

8. An appeal lies from a decree of the probate court, sustaining a demurrer to a petition filed, under the act of 1854, to compel a settlement from a personal representative of his intestate's administration on an estate, because of the failure to allege that assets of the first estate came to the defendant's hands; and dismissing the petition with costs, on the petitioner's declining to amend.—Howard's Distributees v. Howard's Adm'r, 682

JUDICIAL OFFICERS.

1. The thirty-third section of the judiciary act of 1789, (U. S. Statutes at Large, vol. i, p. 91,) which empowers justices of the peace and other officers therein named to arrest and commit (or bail, as the case may require) persons charged with a violation of the criminal law of the United States, is not unconstitutional: the authority thus conferred on justices of the peace is not "judicial power" within the third article of the Federal constitution, nor does the exercise of it make them Federal officers within the second clause of the second section of the second article.—Ex parte Gist, 156

2. The rule of the common law, which still prevails except so far as it has been changed by particular statutes, held a judge exempt from a civil suit, or indictment, for any act done, or omitted to be done by him, when sitting as judge.—Hamilton v. Williams, 527

3. Under the statute which gives an action at law on the official bond of a county-court judge, "for any injury, waste, or damage sustained in any estate, in consequence of any neglect or omission of taking good and sufficient security from guardians, executors, or administrators", (Clay's Dig., p, 296, § 1,) no suit can be maintained on his bond, for the failure of the judge to require a guardian to renew his bond, or to give further security, on account of the insolvency, removal &c., of his original sureties. 527

JURISDICTION.

1. When the jurisdiction of a court depends upon its ascertainment of a preliminary fact, the exercise of jurisdiction implies the previous ascertainment of the jurisdictional fact; and its decision as to that fact cannot be collaterally called in question; and therefore, where an order of sale is made by the orphans' court, the necessity for the order, being a jurisdictional fact, must be considered as having been made apparent to the court, and cannot be inquired into in a collateral proceeding.—Wyatt's Adm'r v. Steele, 640

See ATTACHMENT, 7.
CHANCERY, 10.
PLEADING AND PRACTICE IN CHANCERY, 9.
PROBATE COURT, 1, 2, 3, 4, 8.

LARCENY.

See CRIMINAL LAW, 1, 2, 39, 40, 41, 42.

LIMITATIONS, STATUTE OF.

1, By the Civil Code of Louisiana (p. 521, ch. 23, § 2) slaves without written title may be prescribed by a possession of fifteen years; and slaves with written title (Art. 3444), by a possession of five years.—Miller v. Jones' Adm'r, 247

2. Section 2490 of the Code applies only to all partial payments, or attempts to avoid the statute of limitations by subsequent undertakings, made since the Code went into effect, but not to verbal promises made previous to that time.—Jordan's Adm'r v. Hubbard and Wife, 433

3. In assumpsit by husband and wife, to recover on a promise to pay for services rendered by the wife to the defendant's intestate in his lifetime, it was shown that the intestate, on one occasion, went to defendant's house to get the latter to write his will, but did not find him at home; that on his return he met witness, and, after telling him the object of his visit, stated, 'that he was satisfied he would not live long, and never expected to see B. (defendant) again; that he wanted him (witness) to bear witness that he wished B. to pay Mrs. H. (plaintiff's wife) $500 for the services she had rendered him': *Held*, that this admission was not in the nature of a testamentary bequest, but was a distinct acknowledgment of the services rendered by the wife, and a positive direction to the defendant to pay the specified sum in consideration of them, and was sufficient (before the adoption of the Code) to remove the bar of the statute of limitations. 433

4. In the computation of time under a statute, the settled practice in this State is, to include one day and exclude the other, unless the statute requires so many entire days to intervene; and therefore, under the act of 7th February, 1843, (Clay's Digest, p. 123, § 93,) which limits actions for the recovery of lands to ten years after the accrual of the cause of action, a suit commenced on the 7th February, 1853, is not barred.—Owen v. Slatter, 547

MARRIED WOMEN—See HUSBAND AND WIFE.

MANDAMUS.

1. *Mandamus* from the Supreme Court does not lie to compel the chancellor to dismiss a cause on motion, in pursuance of a written agreement between the parties to that effect;—Ex parte Rowland, 133
2. *Mandamus* from the Supreme Court does not lie to compel the Circuit Court to strike a cause from the docket, on motion, on the ground that it has been discontinued by a submission to arbitration.—Ex parte Garlington, 170

MORTGAGES.

1. When an execution, either from a court of record, or from a justice's court, is levied by a sheriff or constable on mortgaged property, the mortgagee, or his assignee, may interpose a claim and try the right of property (Code, § 2595) before the law-day of the mortgage.—Floyd v. Morrow, 353
2. A mortgage conveying, among other personal property, "the hire" of certain slaves, "or the use of them the present year, and whatever negroes I (mortgagor) may hire next year to make a crop with, and the entire crop I may make this year and next," is not void on its face. 353

See CHANCERY, 1, 2, 3, 4, 5, 6, 7.

NON-CLAIM, STATUTE OF.

1. The statute of non-claim does not apply to equities of redemption.—Locke's Executor v. Palmer, 312

PARTNERSHIP.

1. If the several proprietors of different portions of a public line of travel by agreement among themselves, appoint a common agent at each end of the route, to receive the fare and give through tickets, this does not, of itself, constitute them partners as to passengers who purchase through tickets, so as to render each one liable for losses occurring on any portion of the line.—Ellsworth v. Tartt, 733

PLEADING AND PRACTICE.

I. AT LAW.

1. When an attachment is sued out against a steamboat to recover damages for injuries caused by her running into a flat-boat, (Pamphlet Acts 1843-4, p. 98,) the declaration must be against the boat itself, and not against the owners, although the attachment bond is made payable to the owners, and their names are also stated in the affidavit on which the attachment was issued.—Owners of Steamboat Farmer v. McCraw, 189
2. Proper practice prescribed for declaring against a boat under this statute, and for the intervention of her owners. 189
3. The proceedings under this statute, except so far as they are changed by the act itself, must be governed by the rules of the common law; and therefore any facts which would defeat an action on the case against the owners at common law will have the same effect when pleaded to proceedings against the boat. 189
4. When the owner of the lost or damaged goods brings his action against the owners of the boat which caused the loss or damage by running

PLEADING AND PRACTICE AT LAW—CONTINUED.

into the flat-boat on which the goods were, a plea of a former recovery by the common carrier for the injuries caused by the collision, "which (it avers) are the same injuries in the plaintiff's declaration alleged to have been done to the goods of the said plaintiff," is not equivalent to an averment that the recovery was for the damage done to the goods described in the declaration—*non constat*, that it may not have been for damages done to the goods of some other person which were on board the flat-boat at the same time; such a plea, therefore, is defective on demurrer. 189

5. If a demurrer is improperly sustained to a declaration, and the plaintiff then amends, he thereby waives his right to review on error the decision of the court in sustaining the demurrer.—Stallings v. Newman, 300

6. In trespass to recover damages for injuries inflicted on a slave, which caused his death, it is not necessary to aver with particularity in the declaration everything that was done on the prosecution for the felony, nor to state what witnesses appeared, or what testimony was offered: an averment that the defendants were prosecuted before a justice of the peace, by whom they were required to enter into recognizances for their appearance at the next term of the Circuit Court to answer the felony, and that at that term of the court they were duly prosecuted before the grand jury, who made diligent inquiry into the charge, but found no indictment against any of the defendants, is a sufficient allegation of the prosecution.—Nelson v. Bondurant, 341

7. A plea, averring that defendant, at the time of the alleged trespass, had the rightful and legal control and possession of the slave, under a contract of hiring from his owner; that the slave refused to obey him, and forcibly resisted the exercise of his lawful authority; and that he only inflicted such proper and moderate chastisement as was absolutely necessary to overcome such resistance and to subdue the slave, is a full defence to such action. 341

8. The wrongful sustaining of a demurrer to a special plea, when the defendant had the full benefit of all the facts alleged in it under his other pleas, is not a reversible error. 341

9. A misjoinder of plaintiffs in an action of trespass *quare clausum fregit* will defeat a recovery; but there is no such misjoinder when the executors of a deceased tenant in common join with the surviving tenant.—Patton v. Crow, 426

10. In detinue for a slave, a plea in bar to the further maintenance of suit, setting up a recovery by defendant against plaintiff in a subsequent action of assumpsit for the hire of the slave, is fatally defective on demurrer, unless it shows that the question of ownership entered into the issue on that trial: an averment that the declaration in that suit alleged that the plaintiff therein was the owner of the slave, is not sufficient, as the recovery might have been had under a bailment, which would render the allegation of ownership immaterial.—Chamberlain v. Gaillard, 504

11. If the plea contains an additional averment, that the ownership of the slave formed a material part of the issue on the former trial, it is still defective: to make it a good plea in bar to the detinue suit,

PLEADING AND PRACTICE AT LAW—CONTINUED.

it must show that, on the former trial, the jury necessarily determined that the plaintiff therein was the owner of the slave down to the commencement of the detinue suit. 504

12. If issue is joined on such defective plea, unless defendant shows a state of facts which negatives his right to have recovered on any other ground than that of his ownership, his plea is not sustained, and the court may so instruct the jury. 504

13. The practice in this State is settled, that the plaintiff, unless he waives his right to open the case, is entitled to the opening and conclusion in every case, no matter what the form of the issue may be. 504

14. Under the Code (§ 2570), in a suit commenced by attachment, a judgment by default cannot be taken on the first day of the term to which the writ is returnable; but if the suit is brought in either the Circuit or City Court of Mobile, and the attachment is levied more than twenty days before its return, judgment by default may be taken on the first day of the term under the provisions of the act of February 17, 1854, (Pamphlet Acts 1853-4, p. 91, § 6.)—Letoudal v. Huguenin, 552

15. A complaint in the form prescribed by the Code (p. 551), "on promissory note, by payee against maker", is sufficient to support a judgment by default; and its legal effect is the same as if it contained an averment, in express terms, that the note was payable to the plaintiff. 552

16. In a suit brought by the purchaser of negotiable paper at a sale of the assets of the Planters and Merchants' Bank of Mobile, made by its trustees under the act of 1850, an allegation in the declaration that the charter was surrendered, but was continued by virtue of the provisions of the several acts for the settlement of the Bank's affairs, is not repugnant or contradictory, when construed with reference to those acts.—Savage & Darrington v. Walshe & Emanuel, 619

17. A plea, averring "that the charter of the Bank was not forfeited, and its corporate existence was not dissolved" is fatally defective on demurrer: the first allegation is no answer to the declaration, which alleges that "the charter was surrendered to the State," and the second is an allegation of matter of law. 619

18. So, a plea, averring that the trustees "were not invested with the legal ownership and control of said note, and did not make a legal transfer and endorsement of the same to the plaintiffs", is but the allegation of a legal conclusion instead of facts, and therefore demurrable. 619

19. The same objection applies to a plea which avers "that said Bank, at the date of said note, had no power or authority to make a contract, and that said note is null and void." 619

20 The genuineness of an endorsement of the note sued on can only be denied by a sworn plea. 619

21. Where defendant by his plea puts himself upon one issue, he thereby admits all the rest. 619

22. Assumpsit and case are equally maintainable, on the promise of indemnity which the law implies against a principal, for such losses and damages as flow directly and immediately from the execution of

PLEADING AND PRACTICE AT LAW—CONTINUED.

the agency, when the act itself is not manifestly illegal, and is not known by the agent to be wrong; but in either action the declaration must allege a breach —Moore v. Appleton, 633

23. If the declaration is in case, to recover indemnity from the principal for certain damages recovered in trespass against the agent by the true owner of the property taken, it must negative the existence of any knowledge on the part of the agent, at the time of the taking, that he was committing a trespass, although the *onus* of proving such knowledge may be on the principal. 633

24. When an attachment is sued out in a case not authorized by law, a motion to quash it is not the proper remedy, nor is the refusal to quash on motion revisable on error.—Gill v. Downs, 670

25. But if a motion to quash were proper in such case, the objection is waived by the failure to make it at the first term, and by afterwards appearing and pleading to the merits. 670

26. In an action (under the Code) for the recovery of land, a plea in abatement, setting up the pendency of a former suit brought by the plaintiffs *and others* to recover the same land, is fatally defective on demurrer.—Hall v. Holcombe, 720

II. IN CHANCERY.

1. The wife's children are not necessary parties to a bill filed, after her death, to subject personal property settled under the provisions of the act of 1846, "to protect the rights of married women", to the payment of a charge upon it created by her during coverture. Blevins v. Buck, 292

2. When a note under seal is executed by husband and wife, and is transferred for valuable consideration by delivery merely, the transferror and transferree may join in a bill to enforce its payment out of the wife's separate estate upon which it is a charge. 292

3. If a bill to redeem slaves is filed by two joint mortgagors, and the evidence shows that the slaves belonged to one of them only, this is no material variance.—Locke's Executor v. Palmer, 312

4. Where a bill in equity is filed against husband and wife to subject the wife's separate personal estate to the payment of a note executed by her, if the defendants in their answer admit the existence of a separate estate in the wife as charged in the bill, the court will not inquire into the regularity of the execution of the deed under which she holds.—Ozley v. Ikelheimer, 332

5. If the defendant does not take advantage in the court below, by plea or demurrer, of the want of proper parties to the bill, the objection cannot avail on error, unless the absent parties are indispensable to the rendition of a proper decree. 332

6. One who signed the note as co-maker with the wife, though he would be a proper party to a bill filed by the creditor to subject the wife's separate estate to its payment, is not an indispensable party, when it is averred that he is a non-resident and has no property in this State. 332

7. The rule as to form in pleadings is not as stringent in equity as at law, but the substance of the rules is the same in each court; and

PLEADING AND PRACTICE IN CHANCERY—CONTINUED.

it is a principle of universal application in pleading, founded on reason and good sense, that the plaintiff's title should be stated with sufficient certainty and clearness to enable the court to see plainly that he has such a right as warrants its interference, and the defendant to be distinctly informed of the nature of the case which he is called upon to defend.—Cockrell and Wife v. Gurley, 405

8. Where a bill in equity was filed to protect complainant's remainder in certain slaves, alleging that her father died in Kentucky in 1825, leaving a widow and complainant his only child; that letters of administration were granted on his estate, "and some time afterwards dower was allotted and assigned to the said E (the widow) in her husband's estate, and among the negroes so allotted was a negro woman" (who was particularly described in the bill, and was alleged to be the mother of the other slaves in whom the remainder was claimed); and "that by the statute laws of Kentucky, at the time of the decedent's death, and the allotment of dower to the widow as aforesaid, she was only entitled to a life interest in said slave, and the estate in remainder vested in complainant": *It was held*, that the bill was fatally defective, in not setting out the proceedings by which the widow's dower was assigned, and the statute which gave the widow only a life estate in the slaves allotted, with remainder to the complainant. 405

9. After the dismissal of a bill for want of prosecution, the court has no jurisdiction to reinstate it at a subsequent term; but if the cause is reinstated at a subsequent term, and the defendant craves an appeal from the order, but afterwards engages in the defence—crossing interrogatories, entering into consent, &c.—he thereby waives his objection to the reinstating of the cause, and cannot take advantage of it on error.—Byrd v. McDaniel, 582

10. When a bill is dismissed by the chancellor without a decision upon the merits of the case, and his decree is reversed on error, the safer practice is to remand the cause without determining its merits; thus enabling the parties to raise questions, and make motions, which may materially affect it, and which can only be made in the primary court. 582

11. When the equity of a bill rests upon the existence of a particular fact, that fact must be clearly alleged in the bill: an allegation that complainant "is advised and believes," is not sufficient.—Jones v. Cowles, 612

PRESCRIPTION.

1. By the Civil Code of Louisiana (p. 521, ch. 23, § 2) slaves without written title may be prescribed by a possession of fifteen years; and slaves with written title (Art. 3444), by a possession of five years.—Miller v. Jones' Adm'r, 247

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETIES.

PROBATE, COURT OF.

1. The action of the courts of probate in granting letters testamentary, or of administration, though conclusive in those cases in which they have the power to act, may, like the sentences of all other courts, be assailed for want of jurisdiction; and whenever a suit is brought by a person upon his title as administrator, a plea averring facts which show that the court from which his letters issued had no jurisdiction to grant them, is good.—Miller v. Jones' Adm'r, 247
2. The courts of probate have jurisdiction to grant letters testamentary, or of administration, if property belonging to the estate is brought into the county after the intestate's death, although he was not a resident of this State and had no property here at the time of his death.—Clay's Digest, p. 303, § 33. 247
3. When application is made for letters of administration on the estate of a non-resident, if the petition alleges that "there is property within the county *belonging to the heirs of said estate*, which is likely to be wasted, or so disposed of as to be lost to the said heirs, unless some one should be appointed to administer upon said estate," such an allegation, *it seems*, is equivalent to an assertion of title in the estate; but whether it is or not is immaterial, as it is not the *allegation* in the petition, but the *fact* that there is property in the county belonging to the estate, which gives the court jurisdiction to grant letters of administration, and the applicant is not held down to the ground stated in his petition. 247
4. A probate judge has no jurisdiction, except when sitting as a court in term time, to take a confession of judgment from the defendant in a bastardy proceeding; such a judgment, therefore, is *coram non judice*, and void.—Moore v. McGuire, 461
5. But, *it seems*, the court may declare such judgment void, and proceed with the cause from the last previous continuance. 461
6. Under the statute which gives an action at law on the official bond of a county-court judge, "for any injury, waste, or damage sustained in any estate, in consequence of any neglect or omission of taking good and sufficient security from guardians, executors, or administrators," (Clay's Digest, p. 296, § 1,) no suit can be maintained on his bond for the failure of the judges to require a guardian to renew his bond, or to give further security, on account of the insolvency, removal, &c., of his original sureties. 527
7. On petition to the probate court for the distribution of slaves not disposed of by will, if the number of distributees exceeds the number of slaves to be divided, the court may order a sale in the first instance, without the appointment and report of commissioners.—Hamlet v. Johnson, 557
8. Under the act of February 7, 1854, (Pamphlet Acts 1853-54, p. 24.) the probate court has jurisdiction, on the petition of the distributees of an intestate's estate, whose administrator has died without settling his accounts, to cite the personal representative of such deceased administrator, and have an account and settlement of his administration on the original estate, "as fully and completely" as could have been made by such deceased administrator himself, if alive; and the meaning of the proviso to the third section is, that the personal representative of the deceased administrator shall be per-

PROBATE, COURT OF—CONTINUED.

sonally liable on such settlement only to the amount of the assets of his intestate's estate which have come to his hands.—Howard's Distributees v. Howard's Adm'r, 682

PROMISSORY NOTES.

1. The fact that a note, taken by the trustees of the Planters and Merchants' Bank of Mobile after the surrender of the Bank's charter, was made "negotiable and payable at said Bank", does not raise a legal presumption that it was discounted, instead of being taken in settlement of a debt due.—Savage & Darrington v. Walshe & Emanuel, 619
2. The power of sale conferred upon the trustees by the act of 1850 gave them, by necessary implication, the authority to transfer negotiable securities so as to pass the legal title to the purchaser by their assignment, and enable him to sue in his own name. 619
3. The genuineness of an endorsement of the note sued on can only only be denied by a sworn plea. 619
4. The holder of endorsed mercantile paper before maturity, is presumed in law to have acquired it *bona fide* and for valuable consideration; and the party who seeks to defend against it, by reason of some payment, set-off, or equity against the payee or some intermediate holder, is required to show that the holder did not give value for it, or to raise a presumption of that fact sufficient to require an explanation from the holder of the manner in which he received it.—Minell & Co. v. Reed, 730
5. A deed of trust, if properly recorded, is constructive notice of the lien in all contests respecting the property; but this constructive notice does not run with mercantile paper, secured by the deed, so as to charge a *bona fide* holder before maturity with knowledge of its recitals; if there is nothing on the face of the paper itself which could give the holder such notice, or put him upon inquiry, he cannot be affected by any payments, discounts, sets-off or equities existing between the antecedent parties. 730

RETAILING.

See CRIMINAL LAW, 3, 4, 12.

SALES JUDICIAL.

1. A sale of real estate by commissioners under an order of the probate court, does not affect the widow's right of dower; and although the order was made on her application as administratrix, her failure to announce at the sale that the land was sold subject to her dower, does not estop her from asserting her claim.—Owen v. Slatter, 547
2. The opinion previously pronounced in this cause (23 Ala. 764), construing the order of sale of "*perishable property*" as authorizing a sale of slaves, must stand as the law of the case, when remanded to the primary court for another trial, and when brought up again on appeal.—Wyatt's Adm'r v. Steele, 639
3. If an administrator sells slaves under an order of sale of "the perishable property" of his intestate's estate, the validity of the sale, if it was conducted publicly and according to law, is not affected by his opinion or belief that the order did not authorize him to sell the slaves. 639

SCIRE FACIAS.

See EXECUTORS AND ADMINISTRATORS, 7.

SET-OFF.

1. In a suit on a debt due from defendant to plaintiff individually, the defendant cannot set off a debt due to him by open account from a firm of which plaintiff is a member.—(Code, §§ 2142, 2143.—Duramns v. Harrison & Whitman, 326

2. Defendant, being indebted to plaintiff by open account for goods sold and delivered, gave him a note for a larger amount on a third person, and agreed to take up the difference in goods at cash value as he might want them, and received part of the goods the next day; but plaintiff, discovering a few days afterwards that the maker of the note was insolvent, thereupon tendered back the note, and demanded a rescission of the contract, and then brought suit on the account for goods sold, &c.; to which defendant pleaded payment and set-off: *Held*, that if plaintiff received the note in payment of the account, without any fraud or misrepresentation on the part of defendant to induce him so to take it, then the delivery of the note operated a payment and extinguishment of the account, and plaintiff became bound to defendant for goods at cash value to the amount of the difference between the note and account; but that this liability for goods, coupled with the disaffirmance of the contract on the part of plaintiff, could not be used as a set-off in this suit, so as to entitle defendant to judgment for the difference between the note and account.—Carriere v. Ticknor, 571

SHERIFFS.

1. A sheriff has no power under the Code to admit to bail a person charged with a felony after indictment found, nor can that power be delegated to him by an order of the Circuit Court in these words:—"And it appearing to the court that the offence with which the prisoner stands charged, namely, murder in the second degree, is bailable, it is ordered that, upon the prisoner giving good and sufficient bail, according to law, for his appearance at the next term of this court, in the sum of $1,000, then said prisoner be discharged from custody until the next term of this court."—Antonez v. The State, 81

2. The statute which requires the plaintiff, in a suit for freedom, if out of the possession of the person claiming him as a slave, to enter into a recognizance, with sufficient sureties, to make good to his owner all such costs and damages as he shall have incurred in consequence of said suit, and to be forthcoming to abide the sentence of the court, (Clay's Digest, p. 542, § 19,) does not impose on the sheriff the duty of detaining him for that purpose; nor can his sureties, by surrendering their principal to the sheriff, discharge themselves from their bond.—Jones v. Covey, 464

3. But if the sheriff receives him, when surrendered by his sureties, and commits him to jail, he (and *a fortiori* the jailor, who is but his deputy) cannot recover against the sureties for board furnished their principal. 464

SLANDER.

1. In slander for words spoken charging plaintiff with the crime of having murdered defendant's son, it is not necessary to aver the death of the person said to have been murdered.—Stallings v. Newman, 300
2. What are privileged communications which will not sustain an action for slander. 300
3. A witness may testify that he received and understood the defendant's communication as private and confidential, in the absence of any injunction of secrecy from the defendant, or of any declaration on his part that they should be so regarded; but whether the communication was so intended by the defendant, or, if so intended, was nevertheless prompted by malice, is a question for the determination of the jury. 300
4. The court having instructed the jury, "that confidential communications, made in the usual course of business, or of domestic or friendly intercourse, should be liberally viewed by juries"; *held*, that the charge was not erroneous 300
5. The words declared on as slanderous, charging plaintiff with having murdered defendant's son, being shown to have been spoken while defendant and witness were alone together, going to a neighbor's house to get him to read a letter which defendant had received relative to his son's death, *held*, that defendant's declaration to witness, made in the same conversation, "that his wife was much distressed on account of her son's death", was admissible evidence for him, as tending to show that the words spoken were prompted by grief rather than malice. 300

SLAVES.

1. In the absence of an express stipulation, the owner delegates to the hirer the same right to punish and correct the slave which he himself has; but if the punishment inflicted by the hirer, when considered with a just regard to all the attendant circumstances, is either cruel or barbarous, he becomes a trespasser *ab initio*, and liable to damages at the suit of the owner.—Nelson v. Bondurant, 342
2. But the mere fact that the slave was tied when the punishment was inflicted, and so secured as to prevent resistance on his part, does not affect the rights or liabilities of the parties. 342
3. The statute which requires the plaintiff, in a suit for freedom, if out of the possession of the person claiming him as a slave, to enter into a recognizance, with sufficient sureties, to make good to his owner all such costs and damages as he shall have incurred in consequence of said suit, and to be forthcoming to abide the sentence of the court, (Clay's Digest, p. 642, § 19,) does not impose on the sheriff the duty of detaining him for that purpose; nor can his sureties, by surrendering their principal to the sheriff, discharge themselves from their bond.—Jones v. Covey, 464
4. But if the sheriff receives him, when surrendered by his sureties, and commits him to jail, he (and *a fortiori* the jailor, who is but his deputy) cannot recover against the sureties for board furnished their principal. 464

See TRESPASS.

SPANISH LAND TITLES.

1. The act of Congress of May 8, 1822, (3 U. S. Stat. 699, 700,) "confirming claims to lots in Mobile," &c., confirms only those claims "which, in the opinion of the commissioner, ought to be confirmed"; and the commissioner's report, on which the act is based, only recommends for confirmation, of all the claims embraced in register No. 11, "the claims to such lots as were inhabited and cultivated under the Spanish Government, or such as were built upon by permission of the Spanish authorities." Therefore a claim to a lot which was inhabited and cultivated by one of the claimant's ancestors while Mobile was under the dominion of Great Britain, though included in the commissioner's report, does not come within the provisions of the act of confirmation, when it is shown that the mansion-house, with all the improvements, was burned down during the siege of Mobile by the Spaniards in 1780, and there is no proof of any subsequent inhabitation or cultivation under Spain.—Kennedy's Executor v. Rochon's Heirs, 384

(This applies to the claims of the heirs of A. Rochon, numbered 74, 75 and 76, in the register (No. 11) of claims "founded on private conveyances, which have passed through the office of the commandant, but which are founded, as the claimant supposes, on grants lost by time or accident."—See Commissioner Crawford's Report, in 3d vol Amer. State Papers, p. 32.)

2. The case of Doe ex dem. Farmer's Heirs v. Eslava, reported in 9th How. U. S. Rep. 421, in which a similar claim was held to be within the act of confirmation, cannot be regarded as a judicial determination of the point presented in this case, since no question was there raised as to the fact of confirmation. 384

STATUTES, CONSTRUCTION OF.

1. When words are used in a statute which, when used in reference to the same subject, have obtained a fixed and definite meaning at common law, the inference is that they were intended to be used in their common law sense.—Ex parte Vincent. 145

2. A repealing clause in an unconstitutional statute, declaring "that all laws contravening the provisions of this act be, and the same are hereby repaaled", does not affect the previous laws.—Tims v. The State, 165

3. Courts will not so construe a statute (when its words do not force them) as to defeat a devise or bequest, which would have been valid if the testator had died immediately after making it; but *contra*, as to a statute whose effect is to sustain rather than to defeat a bequest.—Hoffman v. Hoffman, 535

4. In the computation of time under a statute, the settled practice in this State is, to include one day and exclude the other, unless the statute requires so many entire days to intervene; and therefore, under the act of 7th February, 1843, (Clay's Dig., p. 329, § 93,) which limits actions for the recovery of lands to ten years after the accrual of the cause of action, a suit commenced on the 7th February, 1853, is not barred.—Owen v. Slatter, 547

5. Where a statute affects a community, and requires as a condition to its

STATUTES, CONSTRUCTION OF—CONTINUED.

validity that something should be done before it goes into operation, the act has not force or effect until the thing required to be done is performed; but where a statute affects only one or more designated persons, either natural or artificial, those interested in its object may dispense with a preliminary of this character, and claim the benefit of its provisions, without requiring the performance of the condition.—Savage & Darrington v. Walshe & Emanuel, 619

6. For the construction of the several acts "for the final settlement of the affairs of the Planters and Merchants' Bank of Mobile," see Savage & Darrington v. Walshe & Emanuel, 619

7. The act of 1850, which provides (Pamphlet Acts 1849-50, p. 32, § 28) "that partial settlements, whether of executors, administrators, or guardians, shall on final settlement be considered as only *prima facie* correct," does not retroact upon settlements made before its passage.—Duke's Adm'r v. Duke's Distributees, 673

8. Under the act of February 7, 1854, (Pamphlet Acts 1853-54, p. 24,) the probate court has jurisdiction, on the petition of the distributees of an intestate's estate, whose administrator has died without settling his accounts, to cite the personal representative of such deceased administrator, and have an account and settlement of his administration on the original estate, "as fully and completely" as could have been made by such deceased administrator himself, if alive; and the meaning of the proviso to the third section is, that the personal representative of the deceased administrator shall be personally liable on such settlement only to the amount of the assets of his intestate's estate which have come to his hands.—Howard's Distributees v. Howard's Adm'r, 682

STEAMBOATS.

1. When an attachment is sued out against a steamboat to recover damages for the injuries caused by her running into a flat-boat, (Pamphlet Acts 1843-4, p. 98,) the declaration must be against the boat itself, and not against the owners, although the attachment bond is made payable to the owners, and their names are also stated in the affidavit on which the attachment was issued.—Owners of Steamboat Farmer v. McCraw, 189

2. Proper practice prescribed for declaring against a boat under this statute, and for the intervention of her owners. 189

3. The proceedings under this statute, except so far as they are changed by the act itself, must be governed by the rules of the common law; and therefore any facts which would defeat an action on the case against the owners at common law will have the same effect when pleaded to proceedings against the boat. 189

4. The general rule of the common law is, that if both vessels are to blame, neither can recover damages for injuries caused by the collision; but this rule applies only to faults which operated directly and immediately to produce the collision. 189

5. There is no inflexible rule, either of the river or of the road, the neglect of which by one party will dispense with the exercise of common caution by the other. 189

STEAMBOATS—CONTINUED.

6. "Ordinary care" is altogether a relative term; and in such cases as this, the want of it means nothing more than the failure to use those precautions which a just regard to the persons and property of others demands should be used under the circumstances of each particular case. 189

SURETIES.

1. The principles asserted in White v. Banks, 21 Ala. 705, as to the right of contribution among sureties, re-affirmed, and applied to this case.—Tyus v. De Jarnette, 280
2. Complainants and defendant being bound as sureties for one S., to whom defendant was indebted, S. proposed to release defendant from his liability as surety, by giving a new note with other sureties, if defendant would give him a sight draft on his commission merchant for the amount of his indebtedness, or, if he failed to procure defendant's release, that he would then place defendant's notes in the hands of a third person to protect him alone against his said suretyship; and to this arrangement complainants assented: *Held*, that this was an express waiver on the part of complainants of their right to participate in this indemnity. 280
3. But the facts that complainants objected to their principal making an assignment for the benefit of his sureties, because it would injure his credit, and agreed that he might procure the defendant's release from his suretyship, if the latter would pay him the amount of his individual debt; and that defendant then said, in their hearing, that if their principal failed to carry out this arrangement for his relief, he should take measures to secure himself,—are not sufficient to establish a waiver on the part of complainants of their legal right to share in any indemnity or security which defendant might obtain. 280
4. If a debtor deposits with his creditor, unconditionally, notes on a third person as collateral security, the latter thereby acquires the control and direction of their collection, and it becomes his duty to take all necessary measures to prevent the discharge of any of the parties thereto; and in such case notice to bring suit on them should be given to him.—Pickens v. Yarborough's Adm'r, 417
5. If the creditor receives the notes under a special agreement, by which he is not to sue, but to collect in any other mode, he must, as to all persons without notice of the extent of his powers, be regarded as the general holder, and notice to sue may be given to him. 417
6. *It seems*, that if a surety notifies the holder of the note of his suretyship, and requires him to bring suit against the principal, this is a substantial compliance with the requisitions of the statute, (Clay's Digest, p. 532, § 6,) and the party entitled to receive the notice may waive its being in writing; but, whether good or not under the statute, it is good as a common-law notice, when connected with proof of the holder's failure to sue the principal and consequent damage to the surety. 417
7. A surety, who receives from his principal a mortgage, or other security, is regarded as a trustee for his co-surety, and held to the exercise of the duties which attach to that relation; and if he afterwards, without the consent of his co-surety, surrenders or abandons the security,

SURETIES—CONTINUED.

merely because the mortgagor objects to giving up the property, he cannot obtain contribution from his co-surety.—Taylor v. Morrison, 728

TRESPASS.

1. Trespass may be maintained by the owner against the hirer of a slave, for an illegal and forcible injury, causing the slave's death, committed while in the hirer's possession under his contract.—Nelson v. Bondurant, 341
2. In the absence of an express stipulation, the owner delegates to the hirer the same right to punish and correct the slave which he himself has; but if the punishment inflicted by the hirer, when considered with a just regard to all the attendant circumstances, is either cruel or barbarous, he becomes a trespasser *ab initio*, and liable to damages at the suit of the owner. 341
3. But the mere fact that the slave was tied when the punishment was inflicted, and so secured as to prevent resistance on his part, does not affect the rights or liabilities of the parties. 341
4. In trespass to recover damages for injuries inflicted on a slave, which caused his death, it is not necessary to aver with particularity in the declaration everything that was done on the prosecution for the felony, nor to state what witnesses appeared, or what testimony was offered: an averment that the defendants were prosecuted before a justice of the peace, by whom they were required to enter into recognizances for their appearance at the next term of the Circuit Court to answer the felony, and that at that term of the court they were duly prosecuted before the grand jury, who made diligent inquiry into the charge, but found no indictment against any of the defendants, is a sufficient allegation of the prosecution. 341
5. A plea averring that the defendant, at the time of the alleged trespass, had the rightful and legal control and possession of the slave, under a contract of hiring from his owner; that the slave refused to obey him, and forcibly resisted the exercise of his lawful authority; and that he only inflicted such proper and moderate chastisement as was absolutely necessary to overcome such resistance and to subdue the slave, is a full defence to such action. 341

TRIAL OF THE RIGHT OF PROPERTY.

1. When an execution, either from a court of record, or from a justice's court, is levied by a sheriff or constable on mortgaged property, the mortgagee, or his assignee, may interpose a claim and try the right of property (Code, § 2595) before the law-day of the mortgage.—Floyd v. Morrow, 353
2. On trial of the right of property between plaintiff in execution against the mortgagor and the mortgagee as claimant, it is error to exclude the claimant's mortgage from the jury, if it is not void on its face. 353

TROVER.

1. In trover, when the thing converted has a fixed value, the true measure of damages is that value at the time of conversion, and the jury may give interest upon it; and if the value is fluctuating, the jury may take its highest value at any time between the conversion and the trial. Jenkins v. McConico, 213

VENDOR AND VENDEE.

1. *Held*, on the authority of Bush v. Bradford, 15 Ala. 317, that where the purchaser of a slave accepts a bill of sale without warranty, which shows on its face that he took the slave at his own risk, he cannot defend a suit on the note given for the purchase money, on the ground of "misrepresentation without fraud."—Stewart v. Bradford, 410
2. As between vendor and vendee, the stationary machinery by which turning-lathes or other portable machines which are of equal value everywhere are impelled, if erected on the land by the vendor during his ownership, for his own use, for the purposes of either trade or agriculture, and fixed in or to the ground, or to some substance which has already become a part of the freehold, are irremovable fixtures, which pass to the vendee under the deed for the land.—Harkness v. Sears & Walker, 493
3. Where the purchaser of slaves, on discovering their unsoundness, wrote to the vendor informing him of that fact, and tendering them back; and the vendor, in reply, objected that the offer to rescind was made too late, and referred the purchaser to his warranty for indemnity: *Held*, that these letters did not amount to a rescission of the contract, when it was shown that the purchaser had afterwards brought suit on the warranty.—Bennett v. Fail & Patterson, 605
4. If the vendor refuses to accept the property when the purchaser offers to return it, this will dispense with a more formal tender; but the purchaser, if he still retains the property in his possession, must yield it up on the reasonable demand of the vendor, and his refusal to surrender on such demand, even after suit brought, will destroy the effect of his previous tender. 605

WILLS.

1. The words of a devising clause in a will cannot, ordinarily, be carried beyond their just legal import and legitimate meaning, by any supposed general intent to be gathered from the preamble, or introductory part of the will; and it is only in cases of doubt, where the words of a bequest may, without doing violence to the apparent intent and the rules of law, be construed more ways than one, that resort is had to the introductory part of a will to aid in solving such doubt.—Denson v. Mitchell and Wife, 360
2. An express bequest of an estate for life negatives the intention to give the absolute property, and converts a superadded right of disposition into a mere power. 360
3. The introductory part of a will was in these words: "I, J. D., being at this time of sound mind, and in full possession of all my mental faculties, and knowing that I have to die, and desirous of leaving this will", &c., "*desire that my person and property shall, after my death, be disposed of as follows*", &c. In the first seven clauses next succeeding, the testator gave specific bequests of slaves to his several children, giving his sons the absolute property, and limiting the interest of each daughter to a life estate "not subject to the debts of her husband, and after her death to be equally divided among the heirs of her body"; and in the eighth clause he bequeathed to his wife several negroes, all of his household and kitchen furniture, stock

WILLS—CONTINUED.

of horses, cattle, &c., and plantation tools, "*all of which she is to have and hold during her natural life, and at her death to dispose of at her will and pleasure.*" There was no residuary clause, and no bequest over in default of disposition by the wife: *Held*, that the widow took but a life estate in the property bequeathed by this clause, with power to dispose of the remainder; and she having died intestate, that the property went to the testator's personal representative, to be by him administered as in cases of intestacy. 360

4. The common-law distinction stated, between a devise of lands to executors to sell, and a devise that the executors shall sell the lands.—Patton v. Crow, 426

5. The probate of a will, unless contested in the mode and within the period prescribed by the statute (Clay's Digest, p. 598, § 15), is conclusive: and therefore an application to establish a testamentary paper of later date, which is inconsistent with the provisions of the will already probated, cannot be allowed after the expiration of five years, when the applicant does not bring himself within any of the exceptions to the statute.—Hardy v. Hardy's Heirs, 524

6. The Legislature has the power to prescribe rules for the execution of wills, whether made before or after the passage of the statute, if rights have not become vested by the testator's death.—Hoffman v. Hoffman, 535

7. Courts will not so construe a statute (when its words do not force them) as to defeat a devise or bequest, which would have been valid if the testator had died immediately after making it; but *contra*, as to a statute whose effect is to sustain rather than to defeat a bequest. 535

8. Section 1611 of the Code (which requires two witnesses to a will disposing of either real or personal property) applies to a will of realty executed before the adoption of the Code, if the testator died since its adoption; but a will of personalty only would be governed by the old law. 535

9. It is not necessary that the witnesses should sign the will in the presence of each other. 535

10. Where one of several residuary legatees, who take in common, dies before the testator, his legacy, which lapses by his death, does not survive to his co-legatees, but descends to the testator's next of kin under the statute of distribution, and no interest in it passes to one who takes a life estate by implication in the residuum.—Hamlet v. Johnson, 557

11. A testator bequeathed the whole of his property, both real personal, to his wife during her natural life, "with the following exceptions: I give and bequeath the special legacies to my three daughters hereinafter named—I give my daughter Frances one negro girl named Maria, to my daughter Lina one negro girl named Aggy, and to my daughter Mary Ann one negro boy named Alick; which latter named negro, Alick, I give to my daughter Mary Ann, and to the heirs of her body, *and in the event that Mary Ann should die without any such heirs, it is my will, that said boy return to my estate, to be disposed of as the rest of my property.* It is further my will, that at the death of my wife, the whole of my estate, both real and personal, be equally divided among my living children, or to the living heirs of their body, the three above-named daughters to receive an equal proportion in

WILLS—CONTINUED.

common with the rest of my children, notwithstanding the above-named special legacies; provided, however, that the portion falling to my daughter Mary Ann be subject to the same requirements that are made in reference to the boy Alick given to her above." Mary Ann was unmarried at the time of the execution of this will, and also at the testator's death, but she afterwards married, and had one child born, who died before her; and upon her death without issue surviving her, the surviving children and grandchildren of the testator brought detinue against her husband for the boy Alick: *Held*, that the words of the will must be construed in their legal sense, to mean an indefinite failure of issue, and therefore the limitation over was void for remoteness, and Mary Ann took the absolute interest in Alick.—Landman v. Snodgrass, 593

12. Although the last clause in a will must prevail over a preceding clause which cannot be reconciled with it, and the particular intent must yield to the general, when the two are equally apparent, and so repugnant that both cannot stand; yet the great and cardinal rule of construction is, to give effect, if possible, to every part of the will.—Miller and Wife v. Flournoy's Heirs, 724

13. By the fourth clause of his will, testator directed his wife to keep together under her care and protection all his children, and "for the better enabling her to do so," gave her during her widowhood, or until his youngest child attained its majority, "the control and use of any five negroes not otherwise disposed of, to be by her selected"; by the fifth clause, he bequeathed four slaves to his wife during her natural life or widowhood, and on her death or marriage to his children George, William, Marcus, Augustus and Eliza; and the ninth clause was in these words: "I will and bequeath unto my said wife, and my children George, William, Marcus, Augustus and Eliza, and their heirs forever, all the rest and residue of my personal estate, to be equally divided among them, share and share alike, in the manner hereinafter mentioned and described; and that each of my said children shall, upon arriving at full age in law, be entitled to demand from my executors their just distributive share of said estate in this clause mentioned, to be ascertained and determined upon a fair valuation of all my property herein referred to, at the time of his or her majority, by any three disinterested slaveholders of the county; always counting my said wife as a child, *it being my intention to make her and all my children equally interested in the disposition of my estate, including the five negroes hereinbefore mentioned in the third (fourth?) clause*, as reserved for the use of my wife and family": *Held*, that the slaves mentioned in the fifth clause were not included in the general residuary clause, but, on the marriage of the widow, passed to the children to whom they were specifically bequeathed. 724

WITNESS.

1. When female relatives of the defendant, whose evidence is material to his defence, are examined on his behalf at the trial, they cannot be impeached by proof that they were present at the examination be-

WITNESS—CONTINUED.

fore the committing magistrate, and were not then examined as witnesses, although the same evidence was then adduced against him as upon the trial.—Brock v. The State, 104

2. The owner of the flat-boat, who had charge of her at the time of the collision, is not a competent witness for the owner of the damaged goods, in an action against the steamboat for damages; nor is he made a competent witness by the Code (§ 2302).—Owners of Steamboat Farmer v. McCraw, 189

3. An objection to the competency of a witness, on the ground of interest, must be distinctly made at the first opportunity, and cannot be subsequently raised; and if the party, in accepting service of interrogatories, stipulates that he thereby "waives no objection to their legality, pertinency, relevancy, or competency", this will not enable him afterwards to object to the competency of the witness on account of interest.—Hudson v. Crow, 515

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